TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 748

INTERSTATE COMMERCE COMMISSION, PETITIONER

vs.

THE UNITED STATES OF AMERICA, ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 8, 1933

CERTIORARI GRANTED MARCH 20, 1933

(37445)

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Court of Appeals of the District of Columbia

No. 5816

UNITED STATES OF AMERICA on the Relation of J. C. CAMPBELL et al., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION.

a Supreme Court of the District of Columbia.

At Law.

No. 81439.

UNITED STATES OF AMERICA on the Relation of J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as The Birch Valley Lumber Company, a Partnership, Relators,

vs.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for a Writ of Mandamus.*

Filed June 20, 1932.

In the Supreme Court of the District of Columbia.

At Law.

No. 81439.

UNITED STATES OF AMERICA on the Relation of J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as The Birch Valley Lumber Company, a Partnership, Relators,

VS.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

To the Supreme Court of the District of Columbia:

The relators, J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, trading as The Birch Valley Lumber Company, a partnership, respectfully show to this honorable Court as follows:

I. That The Birch Valley Lumber Company was, until the 1st day of January, 1928, a corporation duly organized and existing under the laws of the State of West Virginia.

II. That the said Birch Valley Lumber Company, a corporation, in accordance with a resolution adopted by the stockholders of said corporation on the 29th day of November, 1927, and in accordance with the statutes and
2 the code of laws of the State of West Virginia, was dissolved as of and on the 1st day of January, 1928. A certified copy of the certificate of said dissolution, dated the 4th day of April, 1928, attested and signed by the Secretary of the State of West Virginia, is attached hereto, marked Exhibit A, and prayed to be made a part hereof.

III. That by deed dated the 1st day of January, 1928, and by and between The Birch Valley Lumber Company, a corporation, party of the first part, and J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, partners, trading as The Birch Valley Lumber Company, parties of the second part, the said Birch Valley Lumber Company, a corporation, for a valid consideration received and acknowledged, transferred, assigned, and conveyed, to the said J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, all the property and assets of the said Birch Valley Lumber Company, a corporation, both tangible and intangible, real, personal or mixed, and including all accounts and notes receivable and choses in action. Said deed was presented and admitted to record in the office of the County Court Clerk for Nicholas County of the State of West Virginia on, to wit: June 1, 1932. A certified copy of the deed is attached here-

to, marked Exhibit B, and prayed to be made a part hereof.

IV. That the respondent is the Interstate Commerce Commission as now constituted, created and established under Sections 11 and 24 of the Interstate Commerce Act, and hereinafter called the Commission.

3 V. That Section 3 of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of said Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

VI. That Section 6 (1) of the Interstate Commerce Act provides that every common carrier subject to the provisions of said Act shall file with the Commission schedules showing rates and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad when a through route and joint rate have been established; and that if no joint rate over the through route has been established, the several carriers in such through route shall file with the Commission the separately established rates and charges applied to the through transportation.

VII. That Section 8 of the Interstate Commerce Act provides that in case any common carrier subject to the provisions of said Act shall do, cause to be done, or permit to be done any act, matter, or thing in said Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in said Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of

4 said Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

VIII. That Section 9 of the Interstate Commerce Act provides that any person or persons claiming to be damaged

by any common carrier subject to the provisions of the said Act may either make complaint to the Commission, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of said Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure therein provided for he or they will adopt.

IX. That Section 13 of the Interstate Commerce Act provides that any person, firm, corporation, or company complaining of anything done or omitted to be done by any common carrier subject to the provisions of said Act may apply to the Commission by petition, and if the carriers complained of do not satisfy the complaint within the time specified, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

X. That Section 16 of the Interstate Commerce Act provides that if, after hearing on such complaint the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of said Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which it is entitled on or before the day named.

XI. By the provisions of Section 17 of the Interstate Commerce Act the Commission is authorized to make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission. Acting under the authority so conferred the Commission adopted the following rule with respect to the determination of the amount of reparation due:

"V. Reparation Statements—Formal Claims for Reparation, Based Upon Findings of the Commission—

(a) When the commission finds that reparation is due but that the amount can not be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which reparation is claimed, in accordance with Form 5. (See p. 35.)

The statement should not include any shipment not covered by the commission's findings, or any shipment on which complaint was not filed with the commission within the statutory period. (See Rule III.) The statement together with the paid freight bills on the shipments, or true copies thereof should then be forwarded to the carrier which collected the charges for checking and certification as to its accuracy. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case its certificate must be concurred in by like signature on behalf of a carrier defendant.

(b) If the shipments moved over more than one route a separate statement should be prepared for each route, and separately numbered, except that shipments as
6 to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes.

(c) Statements so prepared and certified shall be filed with the commission, whereupon it will consider entry of an order for reparation. The filing of statements will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. (See Rule III.)

(d) All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the commission."

XII. That in accordance with the provisions of the said Act and the Rules of Practice of the Commission, The Birch Valley Lumber Company, a corporation, and the predecessor in interest of the relators, on, to wit: the 11th day of January, 1927, filed with the Commission a complaint against Strouds Creek and Muddlety Railroad Company, The Baltimore and Ohio Railroad Company, and other defendant carriers named in said complaint, a copy of which is attached hereto, marked Exhibit C, and prayed to be made a part hereof.

XIII. The said complaint described in Paragraph XII hereof alleged, among other things—

(a) that the complainant was and had been engaged in the manufacture and sale of lumber, with its principal office and place of business at Tioga, West Virginia;

(b) that the defendants named were common carriers subject to the provisions of the Interstate Commerce Act;

(c) that complainant's mill was located at Tioga, West Virginia, on the railway of the defendant Strouds Creek and Muddlety Railroad Company, extending from Delphi, West Virginia, to Allingdale, West Virginia, a dis-
7 tance of approximately ten miles and connecting with The Baltimore and Ohio Railroad at the latter point;

(d) that complainant in its regular course of business shipped lumber via through routes from Tioga, West Virginia, to various destinations in the United States and Eastern Canada; that defendants had established through routes from Tioga, West Virginia, to the said various destinations, but had published no joint rates applicable to the through transportation of lumber via such established through routes; that in consequence of the absence of such joint rates, complainant's traffic had been, and then was being, transported at the separately established rates of the Strouds Creek and Muddlety Railroad Company from Tioga, West Virginia, to Allingdale, West Virginia, and The Baltimore and Ohio Railroad Company and its connections from Allingdale, West Virginia, to destinations on its line and on the lines of its connections applied to the through transportation of complainant's shipments in the absence of joint rates, to wit: $15 per car from Tioga to Allingdale, plus the rates applicable from said Allingdale to the said several destinations;

(e) that complainant's competitors shipping from the same general territory were accorded rates less than complainant to the extent of $15 per car for substantially similar service, and that complainant had been injured thereby to its damage;

(f) that the complainant's through rates of $15 per car plus the rates applicable from said Allingdale, had been, were then, and for the future would be unreasonable
8 and unduly prejudicial to complainant and unduly preferential to complainant's competitors to the extent of $15 per car in violation of the Interstate Commerce Act.

XIV. The complainant prayed that after due hearing and investigation the Commission order the defendants to cease and desist from the aforesaid violations of the Interstate Commerce Act, establish joint rates from Tioga, West Virginia, to the several destinations described, the same as from said Allingdale and other points in the same general territory, and to pay reparation to complainant as damages for the injuries caused by the unlawful charges theretofore made and then being made.

XV. Defendant Strouds Creek and Muddlety Railroad filed an answer to said complaint, a copy of said answer being attached hereto, marked Exhibit D, and prayed to be made a part hereof.

XVI. Answers of the defendants other than Strouds Creek and Muddlety Railroad were severally filed, a copy of the answer filed by The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Cincinnati, Indianapolis and Western Railroad Company, Dayton and Union Railroad Company, and the Staten Island Rapid Transit Railroad Company being attached hereto, marked Exhibit E, and prayed to be made a part hereof.

XVII. Thereafter evidence was taken on behalf of complainant and defendants, and the matter was heard on oral argument before Division 3 of the Commission. By
9 the decision and report of the Commission, made through its Division 3, on May 19, 1928, it was found, among other things, that—

(1) "On shipments of lumber the S C & M charges $15 per car for its service to the junction point, which is in addition to the rate from the junction."

(2) "The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory."

(3) "There appears to be no question that complainant is forced to base its prices on the group rates and absorb the charges of the S C & M."

(4) "The rates assailed, insofar as they apply within the United States, were not and are not unreasonable, but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed or may exceed the rates contemporane-

ously maintained on like traffic from the group which includes Allingdale, West Virginia."

XVIII. But, notwithstanding its findings of damage set forth in Paragraph XVII, the Commission made no award of reparation for the damages so found to have resulted from the said violations of the Interstate Commerce Act by the defendants, stating that "the record will not support an award of reparation based on the undue prejudice found to exist."

XIX. By order of the Commission entered May 29,
10 1928, the defendants were ordered to cease and desist on or before August 15, 1928, and thereafter to abstain from practicing the undue preference and prejudice found to exist, as hereinbefore set forth, and to establish, maintain, and apply regulations and practices which would prevent and avoid the undue prejudice and preference so found to exist. Copies of the said report and order entered May 29, 1928 are attached hereto, marked Exhibit F and Exhibit G, respectively, and prayed to be made a part hereof.

XX. Thereafter the defendants, other than the Strouds Creek and Muddlety Railroad Company, filed a petition for reconsideration and reargument before the entire Commission, and for postponement of the effective date of the order. By order of the Commission, dated the 1st day of November, 1928, the said petition was denied and the aforesaid order entered May 29, 1928, was made effective on the 14th day of January, 1929.

XXI. That having found that the relator's lumber was sold in competition with that produced in the same general territory, that complainant was forced to base its prices on the group rates, and absorb a charge of $15 per car by reason of the defendant carriers' violation of said Act in publishing through rates $15 per car higher than the rates enjoyed by complainant's competitors, and that said violation of the Act unduly prejudiced complainant and preferred complainant's competitors in the same general territory, it therefore became the duty of the Commis-
11 sion to find complainant entitled to an award of damages for the undue prejudice found to exist, to determine the amount of damages to which complainant was entitled, and in due time to enter an order directing the carriers to pay reparation to the relators in an amount

measured by $15 per each and every car of lumber shipped by the complainant and the relators during the statutory period.

XXII. That on the 29th day of July, 1930, The Birch Valley Lumber Company, the successor and assignee of The Birch Valley Lumber Company, a corporation, by its attorneys, filed a petition for rehearing and/or reargument for the sole purpose of enabling the Commission to correct its erroneous conclusion that "the record will not support an award of reparation based on the undue prejudice found to exist," and make an award of reparation in conformity with its findings set forth in Paragraph XVII hereof, and to set the case for further hearing under Rule 5 of the Commission's Rules of Practice to determine the total amount of reparation to which complainant is entitled under the Commission's findings set out in Paragraph XVII. On the 2nd day of February, 1931, the said petition was denied by the Commission. A copy of said order is attached hereto as Exhibit H, and prayed to be made a part hereof.

XXIII. That the Commission is required by the provisions of the said Act, upon a finding of damages sustained by a violation of said Act, to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named; that the duty of the Commission to enter such order does not involve the exer-
12 cise of discretion or judgment, but is purely ministerial in nature following as a matter of law from the findings of violation of law and resulting damage, and the requirements of said Act; that the Interstate Commerce Act provides the relators with no remedy by appeal or writ of error; that complaint to the Commission having been made, by the provisions of Section 9 of said Act described in Paragraph VIII hereof, the relators are barred from maintaining an action in any court for the damages sustained by the violations of law described in Paragraph XIII hereof, and found by the Commission as hereinbefore set forth in Paragraph XVII hereof, that the neglect, failure, and refusal of the Commission to enter such an order for the payment of damages was and is an arbitrary failure and refusal to comply with and execute the provisions of the Interstate Commerce Act; and that the aforesaid neglect, failure, and refusal of the Commission to enter an order for the payment

of damages to relators does injury to relators for which they are without adequate remedy.

Wherefore the relators pray that this honorable court issue its writ of mandamus commanding the respondent Commission to determine the full amount of damages sustained by the relators in consequence of the aforesaid violations of the Interstate Commerce Act as found by the Commission and described in Paragraph XIII hereof, the damage sustained by the relators being measured by such amount as the payments of charges to the said carriers on shipments by The Birch Valley Lumber Company, a corporation, and the relators, from Tioga, West Vir-
13 ginia, on and after the 11th day of January, 1925, exceeded the rates contemporaneously maintained on like traffic from the group which included Allingdale, West Virginia, and to enter an order directing the payment to relators by the Strouds Creek and Muddlety Railroad, The Baltimore and Ohio Railroad Company and its connecting carriers of the full amount of said damages with interest thereon, and for such other and further order or relief as may be necessary or proper.

J. C. CAMPBELL,
R. M. CAMPBELL,
J. R. CAMPBELL,
C. W. AMSLER, and
HENRY AMSLER, TRADING AS
THE BIRCH VALLEY LUMBER COMPANY,
Relators,

By J. C. CAMPBELL.
J. C. CAMPBELL.

WILLIAM S. BRONSON,
JOHNSTON B. CAMPBELL,
A. HENRY WALTER,
Attorneys for Relators.

STATE OF WEST VIRGINIA,
County of Nicholas, ss:

J. C. Campbell, being duly sworn, deposes and says: that he resides at Tioga, West Virginia, and that he, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler are members of a partnership trading as The Birch Valley Lum-

ber Company, that he has read the foregoing petition, and that the allegations therein contained are true to the best of his knowledge and belief.

J. C. CAMPBELL.
J. C. CAMPBELL.

Sworn to before me, a notary public, this 15th day of June, 1932.

PAUL McNEILL, [SEAL.]
Notary Public.

14 EXHIBIT A.

Certified Copy of Certificate of Dissolution Described in Paragraph II.

15 STATE OF WEST VIRGINIA.

[STATE SEAL.]

Certificate.

I, George W. Sharp, Secretary of State of the State of West Virginia, do hereby certify that J. C. Campbell, President of The Birch Valley Lumber Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the law of said State, at the office thereof, in the Town of Tioga, West Virginia, on the 29th day of November, 1927, at which meeting all of the stock of such corporation being represented by the holders thereof, in person or by proxy, and voting for the following resolution, the same was duly and regularly adopted and passed, to-wit:

"Resolved, that The Birch Valley Lumber Company, a corporation, do discontinue the business of said corporation as of January 1st, 1928, and in accordance with Section 56, Chapter 53, of the Code and that proper action be taken to pay all debts thereof, and for the devision of its property and assets amongst the stockholders."

And I further certify that a proper certificate of the publication of the notice required by section 56 of Chapter 53 of the Code of West Virginia by the said corporation has been filed in my office, and that the Auditor of the State of West Virginia has certified to me that the said corporation is not delinquent in the payment of the license tax on its charter.

Wherefore I do declare that said notice was duly published, and that the dissolution of said corporation as set forth in the foregoing resolution is authorized by law.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Fourth day of April, 1928.

[STATE SEAL.] GEORGE W. SHARP,
Secretary of State.

STATE OF WEST VIRGINIA:

Nicholas County Court Clerk's Office.

April 5, 1928.

This Writing was this day presented in said office, and thereupon, is admitted to record.

Teste:

C. E. STEPHENSON,
Clerk.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, C. E. Stephenson, Clerk of the County Court of the County of Nicholas, do certify that the foregoing is a true copy of a Certificate of record in my said office in Deed Book No. 79, at page 344.

Given under my hand this the 27th day of May, 1932.

Teste:

(Signed) C. E. STEPHENSON,
Clerk Nicholas County Court.

17 EXHIBIT B.

Certified Copy of Deed by and Between the Birch Valley Lumber Company, a Corporation, and J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Partners, Trading as the Birch Valley Lumber Company, Described in Paragraph III.

18 This deed, made this 1st day of January, 1928, by and between The Birch Valley Lumber Company, a Corporation, party of the first part, and J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, partners, trading as The Birch Valley Lumber Company, parties of the second part.

Whereas, Said party of the first part, at a general meeting of the stockholders of said corporation held on the 29th day of November, 1927, upon due and regular call and notice to all of the stockholders thereof, at least 60% of the capital stock of said Corporation being represented and voting, unanimously passed the following resolutions, to-wit:

"Resolved: That the Birch Valley Lumber Company, a Corporation, do discontinue the business of said corporation as of January 1st, 1928, and in accordance with section 56, chapter 53, of the Code, and that proper action be taken to pay all debts and liabilities of said corporation or provide for the payment thereof, and for the division of property and assets amongst the stockholders.

Resolved: That the individual stockholders of this corporation form a partnership to continue the operation of the same business now carried on by the said corporation, and that in lieu of dividing the property and assets of said corporation that may remain after paying all debts and liabilities of the corporation, that said corporation do deliver to said stockholders when said partnership shall have been perfected, all the property and assets of said corporation in consideration of and upon condition that said partnership so formed by said stockholders shall assume the payment of and pay all debts and liabilities of said corporation and save said corporation harmless therefrom. Said transfer to take effect as of January 1, 1928, and not to include or interfere with any dividends which may be declared and paid

19 on the capital stock of said corporation prior to its final dissolution on January 1, 1928, and the transfer of the remaining assets as of that date, and be it further resolved that the directors of said corporation authorize the execution of all proper writing necessary to effectuate said transfer and do everything else necessary to put same into effect''; and,

Whereas, Pursuant thereto said parties of the second part formed a partnership to continue the operation of the same business formerly carried on by said corporation, party of the first part herein, as shown by Articles of Agreement of Partnership, in writing, dated the 31st day of December, 1927, duly executed and an executed copy of which Articles of Agreement was submitted to said corporation, inspected and found to comply with said resolutions in all respects, and is here referred to for a more particular recital of the contents thereof; and,

Whereas, The board of directors of said corporation, party of the first part herein, at a meeting regularly held on the 10th day of December, 1927, gave due authority to the proper officers of said corporation to execute all papers necessary in the premises; and,

Whereas, It is the desire of said corporation, party of the first part herein, to comply with said resolutions of the stockholders thereof, and proceedings of the directors thereof, and to transfer all of the property and assets of said corporation to said parties of the second part, members of said partnership, and all of the stockholders of record of said corporation at the date of the dissolution thereof:

20 Now, therefore, this deed witnesseth: That for and in consideration of one dollar ($1.00), cash in hand paid, and in further consideration of the premises, and in still further consideration that said parties of the second part shall assume the payment of and pay all debts and liabilities of said corporation, and save said corporation harmless therefrom, and in still further consideration that said parties of the second part accept this deed as settlement in full of their share of the assets of said corporation, as stockholders thereof, in the same proportion as each of said parties of the second part heretofore owned and held stock in said corporation, and in still further con-

sideration that said parties of the second part have this day surrendered to said corporation for cancellation all capital stock therein held by each, respectively, said party of the first part doth hereby grant, by deed, unto said parties of the second part, in such proportion as the interest of each appeared in said corporation by the capital stock held by each, and which is in the same proportion as the interest of each appears in said articles of Agreement of Partnership, heretofore referred to, all the property and assets of said The Birch Valley Lumber Company, a corporation, party of the first part herein, both tangible and intangible, real, personal or mixed, wherever situate, same consisting mostly of standing timber and other real estate, all in Nicholas and Webster Counties, West Virginia, some of which is vested in said corporation by legal title and other of which, said corporation is vested with equitable title, or other rights under contracts; leases and leasehold estates in real estate and improvements thereon, and
21 in other property; a certain saw-mill, equipment and appurtenances, located in and near the Town of Tioga, in said Nicholas County; railroads, railroad equipment and rolling stock from points near said Town of Tioga into the woods; accounts and notes receivable; choses in action; money; lumber on hand and in transit, including logs cut in the woods, in transit or in process of manufacture, and all timber products; investments in other corporations and other businesses, and each and every other kind or form of property owned by said corporation, or to which it is entitled, or in which it has any interest, legal, equitable or otherwise, it being the intention of this deed to transfer and convey unto said parties of the second part all the assets and property of said party of the first part, whether specifically named herein or not, and it is the further intention of this instrument that the assets and property of said corporation shall not be limited by the specific recitals hereof but shall include every form of property or assets of said corporation, whether specifically herein referred to or not.

And said parties of the second part accept this deed as a full compliance on the part of said party of the first part in carrying out the resolutions hereinbefore referred to, and in distributing the assets to the stockholders thereof, parties of the second part herein.

In testimony whereof said party of the first part has caused this instrument to be executed in its corporate name by J. C. Campbell, its President, thereunto duly authorized, and under the corporate seal of said corporation, duly attested by J. R. Campbell, its Secretary, also duly authorized, all on the day and year first above written.

[CORPORATE SEAL.] THE BIRCH VALLEY LUMBER CO.,
By J. C. CAMPBELL,
President.

Attest:
J. R. CAMPBELL,
Secretary.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, Paul McNeill, a Notary Public in and for said county and state, do certify that J. C. Campbell, who signed the writing above for The Birch Valley Lumber Company, a corporation, bearing date the 1st day of January, 1928, has this day in my said county, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 1st day of June, 1932.

[NOTARIAL SEAL.] PAUL McNEILL,
Notary Public.

My commission expires Aug. 10, 1936.

STATE OF WEST VIRGINIA:

Nicholas County Court Clerk's Office.

June 1, 1932.

This Deed was this day presented in said office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste:

C. E. STEPHENSON,
Clerk.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, C. E. Stephenson, Clerk of the County Court of the County aforesaid, do certify that the foregoing is a true

copy of a deed from The Birch Valley Lbr. Co. to J. C. Campbell et al., of record in said Clerk's Office in Deed Book 85 page 131.

Given under my hand this 1st day of June, 1932.

C. E. STEPHENSON,
Clerk County Court.

23 EXHIBIT C.

Copy of Complaint Filed with the Interstate Commerce Commission Against Strouds Creek and Muddlety Railroad Company, the Baltimore and Ohio Railroad Company, et al., Described in Paragraph XII.

24 Before the Interstate Commerce Commission.

No. 19191.

THE BIRCH VALLEY LUMBER COMPANY

vs.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.

Complaint.

The complaint of the above-named complainant respectfully shows:

I. That The Birch Valley Lumber Company, a corporation organized and existing under the laws of the State of West Virginia, is engaged in the manufacture and sale of lumber and other forest products, with its principal office and place of business at Tioga, West Virginia.

II. That the defendants named in list of defendant carriers on pages 6 to 9, are common carriers engaged in the transportation of persons and property, wholly by railroad, or partly by railroad and partly by water, between points in the State of West Virginia and points within the United States and Dominion of Canada, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III. That the mill of the complainant is located on the railway of the Strouds Creek and Muddlety Railroad Company, a common carrier corporation subject to the provisions of the Interstate Commerce Act, extending from Delphi, West Va. to Allingdale, West Va., a distance of approximately ten miles and connecting with the Baltimore and Ohio Railroad at the latter point.

IV. That complainant in the regular course of business ships lumber and other forest products via through routes established by defendant carriers from Tioga, W. Va., to various destinations in the United States and eastern Canada, including eastern Trunk Line, New England and Central Freight Association territories, the following points being typical and representative of said destinations:

Cincinnati, O.	Albany, N. Y.
Chicago, Ill.	Buffalo, N. Y.
Cleveland, O.	New York, N. Y.
Detroit, Mich.	Pittsburgh, Pa.
Grand Rapids, Mich.	Philadelphia, Pa.
Toledo, O.	Baltimore, Md.
Montreal, Quebec.	Boston, Mass.

V. That defendants have established through routes for the transportation of lumber and other forest products from Tioga, W. Va., to destinations referred to in Paragraph IV, but have published no joint rates applicable to the through transportation of lumber and other forest products via such established through routes. That in the absence of such joint rates complainant's traffic, though moving via established through routes from Tioga, W. Va., to destinations referred to in Paragraph IV, is and must be transported at the separately established rates of defendant carriers applicable to the through transportation, to-wit, $15 per car from Tioga, W. Va., to Allingdale, W. Va., as published in current Strouds Creek and Muddlety Railroad tariff, I. C. C. No. 3, and prior issues and the lawful rates applicable from Allingdale, W. Va., to the destination territory referred to in Paragraph IV, as published in current Baltimore and Ohio Railroad tariff, I. C. C. No. 19710 and 20785, and prior issues.

VI. That lumber and other forest products milled by complainant at or near Tioga, W. Va., and shipped via the

Strouds Creek and Muddlety Railroad and its connections come in direct competition in the territory referred to in paragraph IV, with lumber and other forest products milled at or near and shipped from points on The Baltimore and Ohio Railroad, West Virginia Northern Railroad, Cumberland and Pennsylvania Railroad and Western Maryland Railway; the following points being typical and representative shipping points at or near which the mills of complainant's competitors are situate, to-wit:

Points on the Baltimore and Ohio Railroad:

Richwood, W. Va.	Centralia, W. Va.
Gauley Mills, W. Va.	Pickens, W. Va.
Curtin, W. Va.	Sunerest, W. Va.
Arcola, W. Va.	Midvale, W. Va.

Points on the West Virginia Northern Railroad:

Marion, W. Va.	Mattingly, W. Va.
Jessop, W. Va.	Snider, W. Va.
Howesville, W. Va.	Kingwood, W. Va.

27 Points on the Cumberland and Pennsylvania, R. R.:

Hoffman, Md.	Midlothian, Md.
State Line, Pa.	Lord, Md.
Frostburg, Md.	Westernport, Md.

Points on the Western Maryland Railway:

Frostburg, Md.	Coromandel, Md.
State Line, Pa.	Koontz, Md.
Midland, Md.	New Detmold, Md.

VII. That complainant's competitors shipping lumber and other forest products from points on The Baltimore and Ohio Railroad, West Virginia Northern Railroad, Cumberland and Pennsylvania Railroad and Western Maryland Railway, are and have been accorded by The Baltimore and Ohio Railroad Company and other defendant carriers rates lower by at least $15 per car to destinations referred to in Paragraph IV than are and have been accorded complainants for substantially similar service.

VIII. That by reason of the facts stated in the foregoing paragraphs, complainant is now and has been for more than three years past subjected to the payment of rates and charges for the transportation of lumber and other forest products, which were when exacted and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and unreasonable in relation to the rates charged their competitors for substantially similar service to the undue prejudice of complainant and undue preference of complainant's competitors, referred to in Paragraph VI, in violation of Section 3 of the Interstate Commerce Act. That complainant has been injured thereby to its damage.

28 Wherefore complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act and establish and put in force and apply in future to the transportation of lumber and other forest products from Tioga, W. Va., to points in the destination territory named in Paragraph IV hereof, in lieu of rates named in Paragraph V, joint rates not exceeding in amount the rates to the destinations referred to in Paragraph IV applicable from Allingdale, W. Va., or such other rates as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged such sums as in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Tioga, W. Va., December 20, 1926.

The Birch Valley Lumber Company.
J. C. CAMPBELL,
Its President.

OBERG & GILILLAND,
Mills Building,
Washington, D. C.,
For Complainant.

29 The Akron, Canton & Youngstown Railway Company,
Alton & Eastern Railroad Company,
The Ann Arbor Railroad Company,
The Atchison, Topeka and Santa Fe Railway Company,
Atlantic City Railroad Company,
Atlantic Coast Line Railroad Company,
The Baltimore and Ohio Railroad Company,
The Baltimore and Ohio Chicago Terminal Railroad Company,
Bath and Hammondsport Railroad Company,
The Belt Railway Company of Chicago,
Bessemer and Lake Erie Railroad Company,
The Bloomsburg and Sullivan Railroad Company,
Boston and Albany Railroad,
(The New York Central Railroad Company, Lessee).
Boston and Maine Railroad,
Boyne City, Gaylord and Alpena Railroad Company,
Buffalo & Susquehanna Railroad Corporation,
Buffalo, Rochester and Pittsburgh Railway Company,
Bush Terminal Railroad Company,
Canadian Pacific Railway Company,
Central Indiana Railway Company,
Central New England Railway Company,
The Central Railroad Company of New Jersey,
Central Vermont Railway Company,
Central West Virginia & Southern Railroad Company,
Chestnut Ridge Railway Company,
The Chicago and Alton Railway Company,
(William W. Wheelock and William G. Bierd, Receivers).
Chicago and Eastern Illinois Railway Company,
Chicago and Erie Railroad Company,
Chicago & Illinois Midland Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railroad Company,
Chicago, Indianapolis and Louisville Railway Company,
Chicago, Kalamazoo and Saginaw Railway Company,
Chicago, Milwaukee and Gary Railway Company,
Chicago, Milwaukee and St. Paul Railway Company,
(H. E. Bryan, Mark W. Potter and Edward J. Brundage, Receivers).

Chicago, North Shore and Milwaukee Railroad Company,
Chicago, Peoria and St. Louis Railroad Company,
(William Cotter, Receiver).
The Chicago, Rock Island and Pacific Railway Company,
The Cincinnati, Indianapolis & Western Railroad Company,
The Cincinnati Northern Railroad Company,
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Clinton, Davenport & Muscatine Railway Company,
Cumberland and Pennsylvania Railroad Company,
Dayton and Union Railroad Company,
The Delaware and Hudson Company,
The Delaware, Lackawanna and Western Railroad Company,
Detroit and Mackinac Railway Company,
The Detroit and Toledo Shore Line Railroad Company,
Detroit, Toledo and Ironton Railroad Company,
East Jersey Railroad and Terminal Company,
East St. Louis Connecting Railway Company,
Elgin, Joliet and Eastern Railway Company,
Erie & Michigan Railway & Navigation Co.,
Erie Railroad Company,
Evansville, Indianapolis & Terre Haute Railway Company,
30 The Gettysburg and Harrisburg Railway Company,
Goodrich Transit Company,
Grand Trunk Railway System,
(Lines West of Detroit and St. Clair Rivers), comprising the following carriers:
The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company,
(Canadian National Railway Company, Lessee).
Cincinnati, Saginaw and Mackinaw Rail Road Company,
(Canadian National Railway Company, Lessee).
Detroit, Grand Haven and Milwaukee Railway Company,
Grand Trunk-Milwaukee Car Ferry Company,
Grand Trunk Western Railway Company,
The Michigan Air Line Railway,
Toledo, Saginaw and Muskegon Railway Company,

Illinois Central Railroad Company,
Illinois Terminal Company,
Illinois Traction System,
comprising the following carriers:
Illinois Traction, Inc.
St. Louis Electric Terminal Railway Company.
Indiana Harbor Belt Railroad Company,
Indian Creek Valley Railway Company,
The Ironton Railroad Company,
(Lehigh Valley Railroad Company, Reading Company, Lessees).
Jamestown, Westfield and Northwestern Railroad Company,
The Kansas and Sidell Railroad Company,
Lackawanna and Wyoming Valley Railroad Company,
The Lehigh and Hudson River Railway Company,
Lehigh and New England Railroad Company,
Lehigh Valley Railroad Company,
The Lima & Defiance Railroad Company,
Litchfield and Madison Railway Company,
The Long Island Rail Road Company,
The Lorain & West Virginia Railway Company,
Louisville and Nashville Railroad Company,
Louisville, Henderson & St. Louis Railway Company,
Manistee and North-Eastern Railroad Company,
(The Michigan Trust Company, Receiver).
Maryland and Pennsylvania Railroad Company,
The Michigan Central Railroad Company,
Michigan Railroad Company,
(John F. Collins, Receiver).
Middletown and Unionville Railroad Company,
The Minneapolis & St. Louis Railroad Company,
(W. H. Bremner, Receiver).
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
Missouri Pacific Railroad Company,
Mobile and Ohio Railroad Company,
The Monongahela Railway Company,
Montour Railroad Company,
Moshassuck Valley Railroad Company,
The Nashville, Chattanooga & St. Louis Railway,
The New York and Long Branch Railroad Company,
New York and Pennsylvania Railway Company,

The New Jersey and New York Railroad Company,
New Jersey, Indiana & Illinois Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
New York Dock Railway,
The New York, New Haven and Hartford Railroad Company,
New York, Ontario and Western Railway Company,
31 New York, Susquehanna and Western Railroad Company,
Norfolk and Western Railway Company,
The Northern Ohio Railway Company,
The Ohio Public Service Company,
Paducah & Illinois Railroad Company,
The Pennsylvania Railroad Company,
Peoria and Pekin Union Railway Company,
Peoria Railway Terminal Company,
(H. I. Battles, Receiver).
Pere Marquette Railway Company,
The Pittsburgh and Lake Erie Railroad Company,
The Pittsburg & Shawmut Railroad Company,
The Pittsburgh & West Virginia Railway Company,
Pittsburgh, Chartiers & Youghiogheny Railway Company,
The Pittsburgh, Lisbon & Western Railroad Company,
The Pittsburg, Shawmut & Northern Railroad Company,
(John D. Dickson, Receiver).
The Pontiac, Oxford and Northern Railroad Company,
Quebec Central Railway Company,
Rahway Valley Company,
(Rahway Valley Company, Lessee).
Raritan River Rail Road Company,
Reading Company,
Reynoldsville and Falls Creek Railroad Company,
Richmond, Fredericksburg and Potomac Railroad Company,
Rock Island Southern Railway Co.,
Rutland Railroad Company,
St. Louis and Hannibal Railroad Company,
St. Louis Merchants Bridge Terminal Railway Company,
The St. Louis Transfer Railway Company,

The St. Louis, Troy and Eastern Rail Road Company,
Seaboard Air Line Railway Company,
The Sharpsville Railroad Company,
(G. M. McIlvain, Receiver).
South Brooklyn Railway Company,
Southern Railway Company,
The Staten Island Rapid Transit Railway Company,
Strouds Creek and Muddlety Railroad Company,
Terminal Railroad Association of St. Louis,
Toledo, Peoria & Western Railway Company,
(Samuel M. Russell, Receiver).
United Electric Railways Company,
The Virginian Railway Company,
The Virginia Railway Company,
The Wabash, Chester and Western Rail Road Company,
(J. Fred Gilster, Receiver).
Wabash Railway Company,
Western Allegheny Railroad Company,
Western Maryland Railway Company,
The Westfield Railroad Company,
West Jersey and Seashore Railroad Company,
West Shore Railroad,
(The New York Central Railroad Company, Lessee).
West Side Belt Railroad Company,
West Virginia Northern Railroad Company,
Wharton and Northern Railroad Company,
The Wheeling and Lake Erie Railway Company,
The Wiggins Ferry Company,
The Wilkes-Barre and Eastern Railroad Company,
Williamsport & North Branch Railway Co.,
The Williams Valley Railroad Company,
The Winfield Railroad Company, and
The Youngstown & Ohio River Railroad Company.

32 EXHIBIT D.

Answer of the Strouds Creek and Muddlety Railroad, Described in Paragraph XV.

33 Before the Interstate Commerce Commission.

Docket No. 19191.

THE BIRCH VALLEY LUMBER CO., Complainant,

vs.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY, Defendant.

Answer of Defendant Strouds Creek and Muddlety Railroad Company.

The respondent, Strouds Creek and Muddlety Railroad Company for answer to complaint in this proceeding respectfully states:

I. That it admits the allegations of this paragraph.

II. That it admits the allegations of this paragraph.

III. That it admits the allegations of this paragraph.

IV. That it admits the allegations of this paragraph.

V. That it admits the allegations of this paragraph.

VI. That for lack of information it is unable to either admit or deny the allegations of this paragraph.

34 VII. That it believes the allegations of this paragraph to be substantially correct.

VIII. That it admits the allegations of this paragraph.

Wherefore defendant believing that complainants are entitled to the district rates on lumber from mills located on the line of its railway, is willing to grant such rates with the concurrence of the Baltimore & Ohio Railway Company and its connecting carriers and will accept a reasonable division of such rates for the transportation service over its line of railway from the mills of Allingdale, West Virginia, the junction point with the Baltimore & Ohio Railway Company. Defendant is not prepared to admit that the existing rates have damaged complainants and calls for proof thereof.

Dated at Tioga, West Virginia, March 10, 1927.

STROUDS CREEK & MUDDLETY RAILROAD COMPANY.

A. R. YARBOROUGH,

Traffic Manager.

35 EXHIBIT E.

Answer Filed by The Baltimore and Ohio Railroad Company et al., Described in Paragraph XVI.

36 Before the Interstate Commerce Commission.

Docket No. 19191.

THE BIRCH VALLEY LUMBER COMPANY, Complainant,

v.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY et al., Defendants.

Answer of The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Cincinnati, Indianapolis and Western Railroad Company, Dayton and Union Railroad Company, The Staten Island Rapid Transit Railroad Company.

I. These defendants admit the allegations contained in Paragraph I of the complaint.

II. Answering the allegations contained in Paragraph II of the complaint, these defendants admit that they are common carriers, and that, as such, they are subject to the provisions of the Interstate Commerce Act, and the acts amendatory thereof and supplementary thereto.

III. These defendants admit the allegations contained in Paragraph III of the complaint.

IV. Answering the allegations contained in Paragraph IV of the complaint, these defendants state that they are not advised with respect thereto, and, therefore, can neither admit nor deny such allegations, but ask for due proof thereof.

V. Answering the allegations contained in Paragraph V of the complaint, these defendants beg leave to refer to tariffs lawfully filed with the Commission for a correct statement of the rates mentioned therein.

37 VI. Answering the allegations contained in Paragraph VI of the complaint, these defendants state that they are not advised with respect thereto, and, therefore, can neither admit nor deny such allegations, but ask for due proof thereof.

VII. These defendants deny each and every allegation contained in Paragraphs VII and VIII of the complaint.

Wherefore, having answered fully, these defendants ask that the complaint herein be dismissed.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By ARCHIBALD FRIES,
Vice-President,
THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY,
DAYTON AND UNION RAILROAD COMPANY,
THE STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY,
By HERBERT S. HARR,
H. D. SHEEAN,
Their Attorneys.

H. S. HARR,
H. D. SHEEAN,
CHARLES R. WEBBER,
Attorneys for Defendants.

38 EXHIBIT F.

Report of the Interstate Commerce Commission, Described in Paragraph XIX.

39 No. 19191.

BIRCH VALLEY LUMBER COMPANY

v.

STROUDS CREEK & MUDDLETY RAILROAD COMPANY et al.

Submitted November 23, 1927. Decided May 29, 1928.

Rates on lumber, in carloads, from Tioga and Delphi, W. Va., to interstate destinations in Canada, trunk-line, New England, and central territories found not unreasonable but unduly prejudicial. Nonprejudicial rates prescribed for the future.

Oberg & Gilliland and *R. M. Gilliland* for complainant and intervener.

A. R. Yarborough for Strouds Creek & Muddlety Railroad; *Charles R. Webber* and *Elmer L. Beach* for Baltimore & Ohio Railroad and associated lines, defendants.

Report of the Commission.

Division 3, Commissioners Esch, Taylor, and Brainerd.

By DIVISION 3:

Exceptions were filed by all parties to the report proposed by the examiner and oral argument had.

Complainant, a corporation, by complaint filed January 11, 1927, alleges that the rates charged on lumber, in carloads, from Tioga, W. Va., to interstate destinations in Canada, eastern trunk-line, New England, and central territories were and are unreasonable and unduly preferential and prejudicial. Reasonable rates for the future and reparation are sought. At the hearing the Delphi Lumber Company intervened in support of the complainant. Rates are published to the destinations considered in amounts per car, per 100 pounds, and per ton of 2,000 pounds. For convenience, rates will be stated in cents per 100 pounds.

The Strouds Creek & Muddlety, hereinafter referred to by its initials, answered the complaint and expressed its willingness to grant the relief sought by complainant for the future but denies that complainant has been damaged by the existing rates.

Complainant is interested in the establishment of through routes and joint rates not to exceed the district basis. Through routes are available but not joint through rates. It asserts that by reason of competition it is forced to absorb the charge of the S. C. & M. and by reason thereof it can not compete on as favorable terms as its competitors. Complainant's prices are all quoted f. o. b. Allingdale, W. Va. Its markets are various points in Canada, Kentucky, Illinois, Michigan, Ohio, Pennsylvania, New York, New Jersey, Maryland, and the New England States. During the last six months of 1926 a total of 565 cars moved from points on the S. C. & M. to various destinations. The average load was 52,160 pounds per car. Of these, 197 cars were destined to points in Pennsylvania, 128 to West Virginia, 86 to Ohio, 71 to Kentucky, and 26 to New York. The remainder were shipped to various other states. The traf-

fic originating on the S. C. & M. is largely coal and forest products. The former constitutes approximately 50 per cent and the latter 45 per cent of the originated tonnage. The Baltimore & Ohio assumed the burden of defense. It will be referred to herein as the B. & O.

40 Complainant's mill is located on the S. C. & M. at Tioga and that of intervener at Delphi, W. Va. These points are 7.1 and 9.5 miles, respectively, from the connection of that line and the B. & O. at Allingdale. On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction point. The charge of the S. C. & M. is prepaid by the shippers. Complainant manufactures approximately 65,000 feet of lumber per day, and there is about 200,000,000 feet still standing and available to the mill. The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory.

The principal competitors are said to be mills at Gauley Mills, Fenwick, Midvale, Sunerest, and Pickens, W. Va., which produce and manufacture the same grades of lumber as complainant and are located in the same general territory. These points are all on the line of the B. & O., and the district or group rates apply therefrom.

For rate-making purposes the producing territory tributary to the B. & O. in Pennsylvania, Maryland, and West Virginia is divided into several groups. On traffic to trunk-line territory Allingdale is located in what is called the Richwood group. This group embraces the territory from the first station south of Clarksburg, W. Va., on the north to and including Richwood, W. Va., on the south, Jarretts Ford, W. Va., on the west, and Carrollton and Conley, W. Va., on the east. The group is quite extensive. From points therein the Richwood group rate is applied from all stations on the main or branch lines of defendant but not from points on short-line connections. The rates from such latter points are made on a combination of the locals to junction points plus the district or group rate beyond. The length of the branch lines of the B. & O. from points on which the junction-point or district rate is applicable range from 1.1 to 47.9 miles.

On traffic destined to central territory Allingdale is located in Group 9. This group embraces the line from

Clarksburg south to Richwood and includes the line from Weston, W. Va., to Pickens, W. Va., through Buckhannon and Sago, W. Va. The rates from points in this group are established in the same manner as those on traffic to trunk-line territory, that is, the district or group rate applies only from points on the B. & O., the rates from other points being combination of the local rate to the junction plus the district rate beyond.

Complainant compares the rates assailed and the earnings per car afforded with those from various points taking the group or district rates in the same general territory to representative destinations in central and trunk-line territories. These comparisons are illustrated in the appendix hereto.

In the appendix the stations shown from Allingdale to and including Midvale, W. Va., are points on the B. & O.; those from Marion to Kingwood, W. Va., are on the West Virginia Northern; those from Hoffman to State Line, Md., on the Cumberland & Pennsylvania; and those from Frostburg, Md., to State Line on the Western Maryland. The B. & O. is a party to all the rates shown. Those applying from points on lines other than the B. & O. are on the same basis as those applicable from the junction point of those lines with the B. & O. The distances from Westernport, New Detmold, and Kingwood, W. Va., to the point of connection with the B. & O. are 33, 22, and 12.7 miles, respectively, while those from Tioga and Delphi to Allingdale are 7.1 and 9.5 miles, respectively.

A comparison is also made of rates on lumber from the Richwood group and Group 9 on the B. & O. with
41 rates from points in the same general territory for comparable distances to Chicago and New York. With respect to Chicago this comparison shows the group rate is applicable for distances ranging from 576 miles to 761 miles, the average being 632 miles, whereas the distance from Tioga is but 675 miles. To New York the distances for which the blanket rate is applicable range from 509 miles to 665 miles, the average being 557 miles. From Tioga the distance is 603 miles. The inclusion of Tioga and Delphi would increase the average distances from the group but very little and would make no change in the average ton-mile earnings.

The rate policy of the B. & O. is not to extend to points on connecting lines, especially on lumber, the group or junction-point rate except when by competition it is practically compelled to do so. It shows of record numerous short-line connections with which no through rates are in effect. The lines shown are in Virginia, West Virginia, and Pennsylvania. They range in length from 4.5 to 40 miles. It was admitted, however, that joint through rates on lumber are applicable from points on several other short-line connections, the rates being the same as the junction-point or district rate. It is also shown that the B. & O. has through rates on coal applying from points on short-line conections. In fact, such rates apply from points on the S. C. & M. and were established pursuant to the findings in *Tioga Coal Co.* v. *B. & O. R. R. Co.*, 101 I. C. C. 611. Complainant asserts that no sound reason exists for the establishment of the district rates on coal and the refusal to establish such rates on lumber, as both are basic commodities, and competition in the production and sale of each is very keen. In answer thereto the B. & O. asserts that the conditions surrounding the establishment of coal rates are entirely different from those governing the making of rates on lumber. The B. & O. points out that its policy is no different from that of many other carriers in southern and trunk-line territories. It refers to numerous short lines connecting with lines in the South and others connecting with the Pennsylvania in trunk-line territory with which through rates on the basis of the junction-point rate have not been established. It was admitted, however, that while this is true there are also numerous other short-line connections with the same lines shown from which through rates, the same as the rates from the junction point, are in effect.

The B. & O. compares the group rates from Allingdale with those applicable from the various groups surrounding this point. The rates from Allingdale to destinations shown in central territory range from 21.5 to 31.5 cents and produce ton-mile earnings of from 10.3 to 15.5 mills and car-mile earnings ranging from 26.5 to 39.8 cents. Similar rates are in effect from the groups surrounding that within which Allingdale is located. The rates from Allingdale, or the Richwood group in which it is located, are higher than

those from the other groups surrounding it on traffic to trunk-line territory. Defendant B. & O. asserts that these comparisons reflect the reasonableness of the rates from Allingdale. Complainant, however, does not question the reasonableness *per se* of the blanket or group rates from Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high.

The B. & O. also compares the rates from Allingdale with those applicable from points on the Chesapeake & Ohio to common destinations. This comparison shows that from Allingdale for distances ranging from 245 to 614 miles the rates vary from 21.5 to 31.5 cents, with ton-mile earnings of from 10.3 to 15.4 mills; that through rates from points on the S. C. & M. to the same destinations range from 23.5 to 34.5 cents; and that from points on the Chesapeake & Ohio, for average distances of from 175 to 478 miles, the rates range from 21.5 to 29.5 cents.

42 The B. & O. refers to the foregoing as showing the reasonableness of the rates assailed. It also shows that sixth-class rates have been found reasonable for application on lumber in trunk-line territory. *Hines Lumber Co.* v. *Director General*, 60 I. C. C. 590, and *White Pine Asso.* v. *Director General*, 81 I. C. C. 401. Further in support of the reasonableness of the present rates and its policy the B. & O. cites the case of *Peytona Lumber Co.* v. *C. & O. Ry. Co.*, 93 I. C. C. 363, wherein we found the rates on lumber from points on the Guyandotte branch of the Chesapeake & Ohio not unreasonable or unduly prejudicial.

In *Indian Creek Valley Lumber Co.* v. *B. & O. R. R. Co.*, 126 I. C. C. 161, the rates on lumber and lumber products from points in Pennsylvania on the Indian Creek Valley Railroad to interstate destinations in trunk-line and central territories were found unreasonable and unduly prejudicial to the extent they exceeded the group basis. The facts in that case are very similar to those in this. The B. & O., however, raises a contention with respect to the ownership and management of the S. C. & M., it being its position that the S. C. & M. is controlled and operated by complainant herein. While this may be true, intervener

operating the mill at Delphi has no connection whatsoever with the S. C. & M. However, the S. C. & M. differs from the Indian Creek Valley in that the latter is controlled by the B. & O.

The leading case on the issues here before us is *Swift Lumber Co.* v. *F. & G. R. R. Co.*, 61 I. C. C. 485. In that case, complainant's mill was located at Knoxo, Miss., on the Fernwood & Gulf, 27 miles from its junction with the Illinois Central. The rates on lumber were blanketed from all points on the main and branch lines of the Illinois Central and other trunk lines in the surrounding territory. The rates from points on the Fernwood & Gulf were based on arbitraries over the group rates, except to destinations in Tennessee, where the full combination on the junction point applied. The Illinois Central did not extend the group rates to points on any of its short-line connections in this territory, but it participated in joint rates from points on three or four short lines which connected with other trunk lines. Knoxo was well within the blanketed territory, it being pointed out that the distances over the short routes were from 26 to 71 miles less than from various other points in the group. We found that the rates assailed were not unreasonable, except to points in Tennessee, but were unduly prejudicial to the extent that they exceeded the blanket basis. The following, quoted from pages 490 and 491 of our report, is equally applicable here:

"The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. * * *

Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense,

but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main
43 lines and branch lines of defendants.

* * * Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points."

The facts of this case are very similar to those in the *Swift Lumber Co. case.* The S. C. & M. appears to be well within the blanket territory here as was the Fernwood & Gulf in that case. For example, the distances from Tioga are 63 and 86 miles less than from the most distant points taking the group rates on traffic to New York and Chicago, respectively. In that case as here it was the policy of the principal trunk-line defendant to not extend the junction-point or group rates to points on short-line connections. The Illinois Central system had eight such connections, and none of them were accorded the blanket rates. Here also the B. & O. has not extended the group rates to points on other short lines in the same group, but in other near-by groups taking slightly lower rates the junction-point or group rates are applied from points on certain short lines and a trunk-line connection of the B. & O. The latter contends that this is due to competition, although it is the only carrier which connects with one of the short lines. A similar contention was made by the Illinois Central with respect to its participation in joint rates from points on certain short-line connections of other carriers. The Swift Lumber Company's competition in that case was not shown to be with any particular mills and was not confined to those in the blanket territory. In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the

junction-point or group rates apply from points on certain short-line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant and intervener are forced to base their prices on the group rates and absorb the charges of the S. C. & M.

Our decision in the *Swift Lumber Co. case* was sustained by the Supreme Court in *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515. The court said that the decision was supported by ample evidence. Since then we have generally followed that decision in many cases. In some of them we have required the application of the group rates under section 3 findings only, and in other cases by findings under both section- 1 and 3. They include cases where the complainant owned and controlled the short line. In no case have we failed to find undue prejudice and preference where the rates assailed on lumber were the full combination of the group rates plus the local rates on the branch or short line. No reason appears for reaching a different conclusion in this case.

We find that the rates assailed, in so far as they apply within the United States, were not and are not unreasonable but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va. The record will not support an award of reparation based on the undue prejudice found to exist.

44 An appropriate order will be entered.

BRAINERD, *Commissioner*, dissenting:

No sufficient basis is laid in the majority's report for a finding of undue prejudice. The rates assailed from Tioga and Delphi, on the S. C. & M., which is found by the majority unduly prejudicial to the extent that it exceeds the rate from Allingdale and other points in the same district taking the junction point rate, can not be held illegal unless it is shown that the difference in the rates is not justified by the cost of the respective services, by their values, or by

Rates assailed and earnings per car compared with those from points taking group or district rates.

From—	To Baltimore, Md.			To Philadelphia, Pa.			To New York, N.Y.		
	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]
	Miles	Cents		Miles	Cents		Miles	Cents	
Tioga, W. Va.	414	29.38	$153.22	512	31.38	$163.66	603	34.38	$179.30
Allingdale, W. Va.	404	26.5	138.22	502	28.5	148.66	593	31.5	164.30
Richwood, W. Va.	422	.....	.....	520	.....	.....	611	.....	.....
Gauley Mills, W. Va.	402	.....	.....	500	.....	.....	591	.....	.....
Curtin, W. Va.	412	.....	.....	510	.....	.....	601	.....	.....
Arcola, W. Va.	380	.....	.....	487	.....	.....	578	.....	.....
Centralia, W. Va.	375	.....	.....	473	.....	.....	564	.....	.....
Pickens, W. Va.	359	.....	.....	457	.....	.....	548	.....	.....
Suncrest, W. Va.	355	.....	.....	453	.....	.....	544	.....	.....
Midvale, W. Va.	339	.....	.....	437	.....	.....	528	.....	.....
Marion, W. Va.	178	23	119.97	276	26.5	138.22	367	28.5	148.66
Jessop, W. Va.	180	.....	.....	278	.....	.....	369	.....	.....
Hawesville, W. Va.	182	.....	.....	280	.....	.....	371	.....	.....
Mattingly, W. Va.	183	.....	.....	281	.....	.....	372	.....	.....
Snider, W. Va.	186	.....	.....	284	.....	.....	375	.....	.....
Kingwood, W. Va.	188	.....	.....	286	.....	.....	377	.....	.....
Hoffman, Md.	189	18.5	96.50	287	21.5	112.14	378	25	130.40
Frostburg, Md.	194	.....	.....	292	.....	.....	383	.....	.....
Midlothian, Md.	197	.....	.....	295	.....	.....	386	.....	.....
Lord, Md.	201	.....	.....	299	.....	.....	390	.....	.....
Westernport, Md.	210	.....	.....	308	.....	.....	399	.....	.....
State Line, Md.	184	.....	.....	282	.....	.....	373	.....	.....
Frostburg, Md.	192	.....	.....	290	22	.....	381	.....	.....
Midland, Md.	192	.....	.....	290	.....	.....	381	.....	.....
Coromandel, Md.	196	.....	.....	294	.....	.....	385	.....	.....
Koontz, Md.	197	.....	.....	295	.....	.....	386	.....	.....
New Detmold, Md.	199	.....	.....	297	.....	.....	388	.....	.....
State Line, Md.	183	.....	.....	281	.....	.....	372	.....	.....

1 Rate reduced to cents per 100 pounds including $15 per car, charge of S. C. & M.
2 Earnings per car based on 52,160 pounds, the average loading of complainant's shipments.

Rates assailed and earnings per car compared with those from points taking group or district rates - Continued

From—	To Albany, N.Y.			To Pittsburgh, Pa.			To Cleveland, Ohio		
	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]
	Miles	Cents		Miles	Cents		Miles	Cents	
Tioga, W. Va.	794	34.38	$179.30	270	21.88	$114.10	394	27.88	$145.40
Allingdale, W. Va.	784	31.5	164.30	260	19	99.10	384	25.00	130.40
Richwood, W. Va.	802	.....	.....	278	.....	.....	402	.....	.....
Gauley Mills, W. Va.	782	.....	.....	259	.....	.....	383	.....	.....
Curtin, W. Va.	792	.....	.....	269	.....	.....	393	.....	.....
Arcola, W. Va.	769	.....	.....	255	.....	.....	370	.....	.....
Centralia, W. Va.	755	.....	.....	241	.....	.....	356	.....	.....
Pickens, W. Va.	739	.....	.....	238	.....	.....	353	.....	.....
Sunoreat, W. Va.	735	.....	.....	235	.....	.....	348	.....	.....
Midvale, W. Va.	719	.....	.....	219	.....	.....	332	.....	.....
Marion, W. Va.	640	31	161.70	167	18.5	96.50	292	23.5	122.56
Jessop, W. Va.	642	.....	.....	169	.....	.....	294	.....	.....
Hawesville, W. Va.	644	.....	.....	171	.....	.....	296	.....	.....
Mattingly, W. Va.	645	.....	.....	172	.....	.....	297	.....	.....
Snider, W. Va.	648	.....	.....	175	.....	.....	300	.....	.....
Kingwood, W. Va.	650	.....	.....	177	.....	.....	302	.....	.....
Hoffman, Md.	568	27.5	143.44	159	.....	.....	...	.....	.....
Frostburg, Md.	573	.....	.....	164	.....	.....	...	.....	.....
Midlothian, Md.	576	.....	.....	166	.....	.....	...	.....	.....
Lord, Md.	580	.....	.....	170	.....	.....	...	.....	.....
Westernport, Md.	589	.....	.....	179	.....	.....	...	.....	.....
State Line, Md.	563	.....	.....	154	.....	.....	...	.....	.....
Frostburg, Md.	571	.....	.....	165	.....	.....	...	.....	.....
Midland, Md.	571	.....	.....	165	.....	.....	304	25	130.40
Coromandel, Md.	575	.....	.....	169	.....	.....	328	.....	.....
Koontz, Md.	576	.....	.....	170	.....	.....	...	.....	.....
New Detmold, Md.	578	.....	.....	172	.....	.....	...	.....	.....
State Line, Md.	562	.....	.....	156	.....	.....	335	.....	.....

1 Rate reduced to cents per 100 pounds including $15 per car, charge of S. C. & M.
2 Earnings per car based on 52,160 pounds, the average loading of complainant's shipments.

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Rates assailed and earnings per car compared with those from points taking group or district rates - continued

From—	To Detroit, Mich.			To Chicago, Ill.			To Cincinnati, Ohio		
	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]
	Miles	Cents		Miles	Cents		Miles	Cents	
Tioga, W. Va.	561	31.38	$163.66	675	34.38	$179.30	389	29.38	$153.22
Allingdale, W. Va.	551	28.5	148.66	665	31.5	164.30	379	26.5	138.22
Richwood, W. Va.	569	.....	.....	683	.....	.....	397	.....	.....
Cauley Mills, W. Va.	550	.....	.....	664	.....	.....	378	.....	.....
Curtin, W. Va.	560	.....	.....	674	.....	.....	388	.....	.....
Arcola, W. Va.	536	.....	.....	650	.....	.....	364	.....	.....
Centralia, W. Va.	522	.....	.....	636	.....	.....	350	.....	.....
Pickens, W. Va.	519	.....	.....	633	.....	.....	350	.....	.....
Gunoreet, W. Va.	515	.....	.....	629	.....	.....	346	.....	.....
Midvale, W. Va.	499	.....	.....	613	.....	.....	334	.....	.....
Marion, W. Va.	458	25.5	133.01	572	30	156.48	319	23.5	122.58
Jessop, W. Va.	460	.....	.....	574	.....	.....	321	.....	.....
Hawesville, W. Va.	462	.....	.....	576	.....	.....	323	.....	.....
Mattingly, W. Va.	463	.....	.....	577	.....	.....	324	.....	.....
Snider, W. Va.	466	.....	.....	580	.....	.....	327	.....	.....
Kingwood, W. Va.	468	.....	.....	582	.....	.....	329	.....	.....
Frostburg, Md.	...	.....	.....	620	31.5	164.30	448	26.5	138.22
Midland, Md.	...	.....	.....	644	.....	.....	472	.....	.....
New Detmold, Md.	...	.....	.....	651	.....	.....	479	.....	.....

1 Rate reduced to cents per 100 pounds including $15 per car, charge of S. C. & W.
2 Earnings per car based on 52,160 pounds, the average loading of complainant's shipments.

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other transportation conditions. *United States* v. *Illinois Cent. R. R., supra.* No showing has been made in the instant case that the cost of service from Tioga and Delphi was no greater than the cost of transportation from other points taking the same group rate; that the value of the service was the same; or that other traffic conditions incident to shipment from Tioga and Delphi were so similar to those of shipments from other points enjoying lower rates that the prejudice to which complainant and intervener had been subjected was undue and unreasonable.

(Statement of rates assailed, side folios 45, 46, and 47.)

48 EXHIBIT G.

Order of the Interstate Commerce Commission, Described in Paragraph XIX.

49 Order.

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office, in Washington, D. C., on the 29th Day of May, A. D. 1928.

No. 19191.

THE BIRCH VALLEY LUMBER COMPANY

v.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY; The Baltimore and Ohio Railroad Company; The Akron, Canton & Youngstown Railway Company; Alton & Eastern Railroad Company; The Ann Arbor Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Atlantic City Railroad Company; Atlantic Coast Line Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; Bath and Hammondsport Railroad Company; The Belt Railway Company of Chicago; Bessemer and Lake Erie Railroad Company; The Bloomsburg and Sullivan Railroad Company; Boston and Albany Railroad (The New York Central Railroad Company, Lessee); Boston and Maine Railroad; Boyne City, Gaylord and Alpena Railroad Company; Buffalo & Susquehanna Railroad Corpora-

tion; Buffalo, Rochester and Pittsburgh Railway Company; Bush Terminal Railroad Company; Canadian Pacific Railway Company; Central Indiana Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Railway Company; Central West Virginia & Southern Railroad Company; Chestnut Ridge Railway Company; The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago & Illinois Midland Railway Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Kalamazoo and Saginaw Railway Company; Chicago, Milwaukee and Gary Railway Company; Chicago, Milwaukee and St. Paul Railway Company and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; Chicago, North Shore and Milwaukee Railroad Company; Chicago, Peoria and St. Louis Railroad Company and William Cotter, Receiver; The Chicago, Rock Island and Pacific Railway Company; Chicago, Springfield & St. Louis Railway Company; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati Northern Railroad Company; Clarion River Railway Company; Clinton, Davenport & Muscatine Railway Company; Cumberland and Pennsylvania Railroad Company; Dayton and Union Railroad Company; the Delaware and Hudson Company; The Delaware, Lackawanna and Western Railroad Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Toledo and Ironton Railroad Company; East Jersey Railroad and Terminal Company; East St. Louis Connecting Railway Company; Elgin, Joliet and Eastern Railway Company; Erie & Michigan Railway & Navigation Company; Erie Railroad Company; Evansville, Indianapolis & Terre Haute Railway Company; The Gettysburg and Harrisburg Railway Company; Goodrich Transit Company; The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company, (Canadian National Railway Company, Lessee); Cin-

cinnati, Saginaw and Mackinaw Rail Road Company (Canadian National Railway Company, Lessee); Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk-Milwaukee Car Ferry Company; Grand Trunk Western Railway Company; The Michigan Air Line Railway; Toledo, Saginaw and Muskegon Railway Company; Illinois Central Railroad Company; Illinois Terminal Company; Illinois Traction, Inc.; St. Louis Electric Terminal Railway Company; Indiana Harbor Belt Railroad Company; Indian Creek Valley Railway Company; The Ironton Railroad Company (Lehigh
50 Valley Railroad Company and Reading Company, Lessees); Jacksonville & Havana Railroad Company; Jamestown, Westfield and Northwestern Railroad Company; The Kansas and Sidell Railroad Company; Lackawanna and Wyoming Valley Railroad Company; The Lehigh and Hudson River Railway Company; Lehigh and New England Railroad Company; Lehigh Valley Railroad Company; The Lima & Defiance Railroad Company; Litchfield and Madison Railway Company; The Long Island Rail Road Company; The Lorain & West Virginia Railway Company; Louisville and Nashville Railroad Company; Louisville, Henderson & St. Louis Railway Company; Manistee and North-Eastern Railroad Company and The Michigan Trust Company, Receiver; Maryland and Pennsylvania Railroad Company; The Michigan Central Railroad Company; Michigan Railroad Company and John F. Collins, Receiver; Middletown and Unionville Railroad Company; The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri Pacific Railroad Company; Mobile and Ohio Railroad Company; The Monongahela Railway Company; Montour Railroad Company; Moshassuck Valley Railroad Company; The Nashville, Chattanooga & St. Louis Railway; The New York and Long Branch Railroad Company; New York and Pennsylvania Railway Company; The New Jersey and New York Railroad Company; New Jersey, Indiana & Illinois Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York Dock Railway; The New York, New Haven and Hartford Railroad Company;

New York, Ontario and Western Railway Company; New York, Susquehanna and Western Railroad Company; Norfolk and Western Railway Company; The Northern Ohio Railway Company; The Ohio Public Service Company; Paducah & Illinois Railroad Company; The Pennsylvania Railroad Company; Peoria and Pekin Union Railway Company; Peoria Railway Terminal Company and H. I. Battles, Receiver; Pere Marquette Railway Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburgh, Shawmut Railroad Company; The Pittsburgh & West Virginia Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Lisbon & Western Railroad Company; The Pittsburg, Shawmut & Northern Railroad Company and John D. Dickson, Receiver; The Pontiac, Oxford and Northern Railroad Company; Quebec Central Railway Company; Rahway Valley Company (Rahway Valley Company, Lessee); Raritan River Rail Road Company; Reading Company; Reynoldsville and Falls Creek Railroad Company; Richmond, Fredericksburg and Potomac Railroad Company; Rock Island Southern Railway Co.; Rutland Railroad Company; St. Louis and Hannibal Railroad Company; St. Louis Merchants Bridge Terminal Railway Company; The St. Louis Transfer Railway Company; The St. Louis, Troy and Eastern Rail Road Company; Seaboard Air Line Railway Company; The Sharpsville Railroad Company and G. M. McIlvain, Receiver; South Brooklyn Railway Company; Southern Railway Company; The Staten Island Rapid Transit Railway Company; Terminal Railroad Association of St. Louis; Toledo, Peoria & Western Railway Company and Samuel M. Russell, Receiver; United Electric Railways Company; The Virginian Railway Company; The Virginia Railway Company; The Wabash, Chester and Western Rail Road Company and J. Fred Gilster, Receiver; Wabash Railway Company; Western Allegheny Railroad Company; Western Maryland Railway Company; The Westfield Railroad Company; West Jersey and Seashore Railroad Company; West Shore Railroad (The New York Central Railroad Company, Lessee); West Side Belt Railroad Company; West Virginia Northern Railroad Company; Wharton and Northern Railroad Company; The Wheeling and

Lake Erie Railway Company; The Wiggins Ferry Company; The Wilkes-Barre and Eastern Railroad Company; Williamsport & North Branch Railway Co.; The Williams Valley Railroad Company; The Winfield Railroad Company; Yale Short Line Railroad Company; and The Youngstown & Ohio River Railroad Company.

51 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said division having found in said report that the rates charged for the transportation of lumber, in carloads, from Tioga and Delphi, W. Va., to interstate destinations in Canada, trunk-line territory, New England, and central territory, in so far as they apply to transportation within the United States, are and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceed or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va.

It is ordered, That the above-named defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist on or before August 15, 1928, and thereafter to abstain from practicing the undue prejudice and preference referred to in the next preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish on or before August 15, 1928, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply regulations and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 3.

[SEAL.] GEORGE B. McGINTY,
Secretary.

52 EXHIBIT H.

Commission's Order Denying Petition for Rehearing and/or Reargument, Described in Paragraph XXII.

53 Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 2nd Day of February, A. D. 1931.

No. 19191.

BIRCH VALLEY LUMBER COMPANY

v.

STROUDS CREEK & MUDDLETY RAILROAD COMPANY et al.

Upon further consideration of the record in the above-entitled proceeding, and of complainant's petition for rehearing and/or reargument in the above-entitled case:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

54 *Rule to Show Cause.*

Filed June 20, 1932.

* * * * * * *

Upon consideration of the petition filed in the above-entitled cause, it is, this 20th day of June, 1932,

Ordered, That the respondent, the Interstate Commerce Commission, show cause on or before the 15th day of July, 1932, why the prayer of the petition should not be granted, and the writ of mandamus issued, compelling the respond-

ent to enter an order directing the payment of damages to the relators, J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, trading as The Birch Valley Lumber Company, a partnership, in such amount as the payments made by relators exceeded the rates contemporaneously maintained on like traffic from the group which included Allingdale, W. Va., provided a copy of this order and the petition are served upon the defendant on or before the 25th day of June, 1932.

By the Court:

JESSE C. ADKINS,
Justice.

55 *Marshal's Return.*

Served a copy of the above rule & petition on Interstate Commerce Comm., by George B. McGinty, Secty., 6-20-32, personally.

EDGAR C. SNYDER,
U. S. Marshal in and for
the Dist. of Columbia,
By J. W. ROBERTS,
Deputy U. S. Marshal.

56 *Answer of the Interstate Commerce Commission.*

Filed June 27, 1932.

* * * * * * *

The Interstate Commerce Commission, the respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the Relators' petition contained, for answer thereunto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

I. Answering Paragraphs I to IV, inclusive, of the petition, the respondent, hereinafter called the Commission, admits that the allegations contained in said paragraphs are true. As hereinafter referred to, whenever the word "relator" is used in this answer, it will be understood to

mean either The Birch Valley Lumber Company, a
57 corporation, as defined in Paragraph I of the petition, or its successor or assignee in interest, The Birch Valley Lumber Company, a partnership, as defined in Paragraph III.

II. Answering Paragraphs V to X, inclusive, of the petition, the Commission admits that the allegations therein contained relating to provisions of the Interstate Commerce Act are substantially correct. In this connection, however, the Commission refers the Court to the provisions mentioned for more full and complete information in the premises.

III. Answering Paragraph XI, of the petition, the Commission admits that this paragraph contains a correct copy of Rule V of its Rules of Practice, relating to reparation statements.

IV. Answering Paragraph XII of the petition, the Commission admits that the allegations contained in said paragraph are true.

V. Answering Paragraphs XIII and XIV of the petition, the Commission admits that the allegations therein contained are substantially correct, but for more full and complete information in the premises concerning the contents thereof the Commission respectfully refers the Court to the complaint of January 11, 1927, referred to in Paragraph XII, a true copy of which is attached to and made a part of the petition as Exhibit C.

58 VI. Answering Paragraphs XV and XVI of the petition, the Commission admits that the allegations contained therein are true. In this connection the Commission respectfully refers the Court to copies of the answers referred to in said paragraphs, attached to the petition and made parts thereof as Exhibits D and E, for full and complete information as to the contents thereof.

VII. Answering Paragraphs XVII to XIX, inclusive, of the petition, the Commission admits that evidence was taken on behalf of complainant and defendants and that the matter was heard on oral argument before Division 3, as alleged in Paragraph XVII. The Commission denies that the passages in Paragraphs XVII and XVIII quoted from the Commission's report of May 29, 1928, constitute a full and complete statement of the findings, holdings and conclu-

sions of the Commission in the case; and the Commission respectfully refers the Court to copies of said report and order, which are attached to the petition herein as Exhibits F and G, respectively, for full and complete information as to the contents thereof. In this connection the Commission alleges that the words and figures appearing in line two of page 9 of the petition herein should read "May 29, 1928" instead of "May 19, 1928".

VIII. Answering Paragraph XX of the petition, the Commission admits that the allegations contained therein are true.

59 IX. Answering Paragraph XXI of the petition, the Commission denies that its findings are completely or fully set out in said paragraph. For more full and complete information in the premises, the Commission respectfully refers the Court to its report and order, attached to and made parts of the petition herein, as Exhibits F and G, respectively. The Commission also denies that, under the facts as shown by the evidence and as found by it, any duty rested upon it to make an award of damages in this proceeding. In this connection the Commission alleges that in making said report and order it found that on the record before it, there was no support for an award of reparation to relators.

X. Answering Paragraph XXII of the petition, the Commission denies that the conclusions reached by it in its report and order of May 29, 1928, were erroneous; it also denies that relator is entitled to reparation in any amount as a result of its proceeding before the Commission. The Commission admits the other allegations contained in said paragraph.

XI. Answering Paragraph XXIII of the petition, the Commission denies it found in said report and order of May 29, 1928, referred to in Paragraph IX of the petition, that relators had suffered any damage. On the contrary, the Commission alleges specifically that its finding was: "The record will not support an award of reparation based on the undue prejudice found to exist". The

60 Commission also denies that in said report and order of May 29, 1928, there was in law either neglect, failure, or refusal of the Commission to exercise fully its lawful jurisdiction relative to the complaint involved

therein and the evidence presented to it thereunder; denies that its action in the proceeding was in any respect arbitrary; denies that it either neglected, failed, or refused to discharge any legal duty imposed upon it; denies that in determining the amount of damages resulting from a violation of the Interstate Commerce Act it does not exercise discretion or judgment, and denies that such action is purely ministerial in nature.

Further answering Paragraph XXIII of the petition, the Commission denies that relator will suffer any legal injury as a result of the Commission's report and order of May 29, 1928. The Commission alleges that none of the other allegations contained in said paragraph is either relevant or material.

XII. Further answering the petition, the Commission alleges that prior to the making, entering and serving of said report and order of May 29, 1928, it accorded to the parties to the proceeding, including the relators herein, the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of relators herein by their counsel; that at
61 said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the relators herein, its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions, order, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions, upon which said order is based. That said findings and conclusions were and are, and that each of them was and is, fully justified by the evidence before the Commission in said proceeding. The Commission further alleges that in making said report and order it considered and weighed carefully each fact, circumstance and condi-

tion, arising from the evidence presented, or called to its attention by or on behalf of the parties to said proceeding by their respective counsel.

XIII. Further answering the petition, the Commission denies that the relators are entitled to the relief prayed for, or any relief in the premises, and except as hereinabove expressly admitted, the Commission denies the truth of each and all the allegations contained in said petition, in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact set out in said report and order of the Commission, which are hereby referred to and made a part hereof.

62 All of which matters and things the Commission is ready to aver, maintain, and prove, as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By EDWARD M. REIDY,
Assistant Chief Counsel.
DANIEL W. KNOWLTON,
Of Counsel.

CITY OF WASHINGTON,
District of Columbia, ss:

Claude R. Porter, being duly sworn, deposes and says that he is a member and Chairman of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said Commission, that he has read the foregoing answer and knows the contents thereof, and that the same is true.

CLAUDE R. PORTER.

Subscribed and sworn to before the undersigned a Notary Public within and for the District of Columbia, this 24th day of June, 1932.

[SEAL.] EUGENIA W. SUTER,
Notary Public.

63 *Demurrer to Respondent's Answer.*

Filed July 2, 1932.

* * * * * * *

The plaintiff relators say that the answer of the respondent Interstate Commerce Commission is bad in substance.

For reasons for said demurrer, and the matters of law intended to be argued in support thereof, the relators assign the following:

I. The petition states a cause of action, and the respondent's answer admits the essential allegations of the petition and makes no material allegations of fact in contravention of the petition.

II. The petition alleges, and the answer admits, that after due hearing the Commission found a violation of law in the past and present by defendant carriers.

III. The petition alleges, and the answer of the respondent admits, that with respect to the acts of defendant carriers, the Commission found:

(1) "On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction."

(2) "The lumber is sold in competition with that produced throughout the country and especially that
64 produced in the same general territory."

(3) "there appears to be no question that complainant is forced to base its prices on the group rates and absorb the charges of the S. C. & M."

(4) "the rates assailed, insofar as they apply within the United States, were not and are not unreasonable, but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, West Virginia."

The aforesaid findings constitute a determination that the complainant was damaged by the violations of law by the defendant carriers in the amount of $15.00 per each and every car transported for the complainant by defendant carriers during the period from January 11, 1925 to January 14, 1929.

IV. The Commission is empowered by the statute to hear and determine controversies relating to the award of reparation for damages sustained by reason of the violation of the Interstate Commerce Act. This function of the respondent Commission is purely judicial in nature. The

Commission is required by the provisions of the Interstate Commerce Act, after a determination of damage by reason of violations of the said Act, to enter an order awarding reparation to the complainants. This latter function of the Commission is in no sense judicial but is purely ministerial in nature. The discretion of the Commission was
65 fully exercised in its judicial determination, (1) that there had been a violation of the Act by defendant carriers, and (2) that there had been resulting damage to the complainant. The remaining duty of the Commission which is here sought to be enforced, is the purely ministerial duty of entering an order for the award of reparation to the complainant in which duty there is involved not a single element of judgment or discretion.

V. The Commission has fully discharged its duty insofar as the exercise of its discretion is concerned. From the exercise of that discretion it has found in all respects favorable to the complainant. By failing and refusing to enter an order carrying into effect its findings and judgment, the Commission has inflicted upon the relators an injury for which there is no adequate remedy other than a writ of mandamus from this court, requiring the Commission to carry out the requirements of the Interstate Commerce Act.

A. HENRY WALTER,
WILLIAM S. BRONSON,
JOHNSTON B. CAMPBELL,
A. HENRY WALTER,
Attorneys for Relators.

An oral hearing of the foregoing demurrer is respectfully requested. In my judgment it will require at least one hour for each side to present the oral argument.

A. HENRY WALTER,
Attorney for Relators.

Service of a copy of the foregoing demurrer, together with the attached statement of points and authorities in support thereof, acknowledged this 2nd day of July, 1932.

EDWARD M. REIDY,
Attorney for Respondent.

66 *Memorandum.*

Filed September 29, 1932.

* * * * * * *

In my opinion this case is controlled by *Donner Steel Co. v. I. C. C.*, 52 App. D. C. 221 and *I. C. C. ex rel. Capital Grain & Feed Co.* 59 App. D. C. 118.

Under these decisions the answer states a complete defense. Therefore the demurrer to the answer is overruled.

September 28, 1932.

JESSE C. ADKINS,
Justice.

67 *Judgment.*

Filed October 4, 1932.

* * * * * * *

This cause coming on to be heard upon the petition and the exhibits thereto attached, the answer of the respondent to said petition and the demurrer of the relator to said answer, and upon consideration thereof, it is ordered, adjudged and decreed, this 4th day of October, 1932, that said demurrer be, and the same is hereby, overruled.

Thereupon the petitioner by its attorneys elects to stand upon its demurrer. Wherefore, it is considered that the petition herein be, and the same is hereby dismissed, that petitioner take nothing by this suit, that respondent go hence without day and recover of petitioner its costs of defense to be taxed by the clerk and have execution thereof.

JESSE C. ADKINS,
Justice.

From the foregoing judgment the petitioner, by its said attorneys, in open court, notes an appeal to the Court of Appeals; whereupon, the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the clerk in lieu thereof.

JESSE C. ADKINS,
Justice.

October 4, 1932.

O K as to form.
A. HENRY WALTER,
Attorney for Relators.

68 *Memorandum.*

October 4, 1932.—$50 deposit in lieu of Bond on appeal.

69 *Assignment of Errors.*

Filed October 4, 1932.

* * * * * * *

Now come the relators in the above-entitled cause, by their attorney, assigning errors in the order and judgment entered herein on October 4, 1932, and respectfully show that the Court erred as follows:

1. The Court erred in overruling the demurrer to respondent's answer.

2. The Court erred in entering judgment for the respondent Interstate Commerce Commission.

3. The Court erred in denying the relief prayed by relators, in dismissing their petition, and in refusing to issue a writ of mandamus commanding the Interstate Commerce Commission to enter an award of reparation in favor of the relators.

A. HENRY WALTER,
Attorney for Relators.

Service of a copy of the foregoing assignment of errors acknowledged this 4th day of October, 1932.

E. M. REIDY,
Attorney for Respondent.

70 *Designation of Record.*

Filed October 4, 1932.

* * * * * * *

The clerk will please prepare the record on appeal in the above-entitled cause and include therein the following papers and proceedings:

1. Petition for a writ of mandamus, and exhibits thereto.

2. Rule to Show Cause, issued June 25, 1932.

3. Answer of the respondent Interstate Commerce Commission.

4. Demurrer to respondent's answer.

5. Opinion of the Court dated September 28, 1932.
6. Judgment entered on the 4th day of October, 1932.
7. Memorandum and bond on appeal or deposit for costs.
8. Assignment of errors.
9. This designation of record.

A. HENRY WALTER,
A. HENRY WALTER,
Attorney for Relators.

Service of a copy of the foregoing designation of record is hereby acknowledged this 4th day of October, 1932.

EDWARD M. REIDY,
Attorney for Respondent.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 81439 at Law, wherein United States of America, on the relation of J. C. Campbell, et al. trading as The Birch Valley Lumber Company, a partnership, are Relators and The Interstate Commerce Commission is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of October, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5816. United States of America on the relation of J. C. Campbell et al., appellants, vs. The Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Oct. 14, 1932. Henry W. Hodges, Clerk.

53 Friday, January 6th, A. D. 1933

* * * * * * *

No. 5816

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

vs.

THE INTERSTATE COMMERCE COMMISSION

On motion, the appellants are allowed to file a reply brief herein.

The argument in the above-entitled cause was commenced by Mr. A. Henry Walter, attorney for the appellants, and was continued by Mr. Edward M. Reidy, attorney for the appellee, and was concluded by Mr. A. Henry Walter, attorney for the appellants.

54 Court of Appeals of the District of Columbia

No. 5816

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell. J. R. Campbell. C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

(Argued January 6, 1933. Decided January 30, 1933)

Johnston B. Campbell and A. Henry Walter, both of Washington, D. C., for appellants.

Edward M. Reidy, of Washington, D. C., for appellee.

Before MARTIN, *Chief Justice*, and ROBB, VAN ORSDEL, HITZ, and GRONER, *Associate Justices*

GRONER, *Associate Justice:* This is an appeal from a judgment of the Supreme Court of the District of Columbia dismissing a petition for a writ of mandamus to the Interstate Commerce Commis-

sion. The commission answered the petition, and petitioner demurred. The court overruled the demurrer and entered judgment for the commission.

Petitioner is a partnership, successor to a West Virginia corporation of the same name. Disregarding this change in character, we shall speak of petitioner and its predecessor as appellant.

Appellant was engaged in the lumber business. Early in 1927 it filed with the commission a complaint charging certain violations of the interstate commerce act by the Strouds Creek & Muddlety Railroad Co., the B. & O. Railroad Co., and other connecting carriers, and alleging damage by reason of the violation. It asked for an order against the railroads to "cease and desist" and for reparation for their unlawful acts within the statutory period. Appellant's mills are located on the Strouds Creek Railroad at Tioga, West Virginia, 7.1 miles distant from the junction point of the B. & O. and Strouds Creek, at Allingdale, West Virginia. Appellant's lumber was shipped on through bills of lading from Tioga to interstate destinations on lines of Strouds Creek, B. & O.,
55 and connecting carriers via Allingdale. Appellant was compelled to pay the Allingdale group rate plus the Strouds Creek Railroad charge of $15 per car.

The commission found that appellant's competitors, having their mills within the Allingdale group and located on branch lines of the B. & O., paid only the Allingdale rate, which was $15 per car less than the charges exacted of appellant for the service from its mills to the same destinations. The result of this was that appellant was required to pay $15 more for each car of lumber shipped than its competitors. The commission likewise found that appellant's prices were all quoted f. o. b. Allingdale; that it sold its lumber in competition with that produced in the same general territory, and was forced to base its price on the group rates and to absorb the $15 per car charge of the Strouds Creek road. In these circumstances the commission found that the through interstate rates exacted of appellant "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential to its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, West Virginia," and consequently entered an order requiring the railroads participating in transportation of appellant's lumber within the United States to cease and desist, etc. But the commission also found that "the record will not support an award of reparation based on the undue prejudice found to exist." The conclusion last stated is the bone of contention.

On behalf of the commission it is insisted that mandamus will not lie in a matter involving the exercise of judgment or discretion and that this is such a case, and in support of this it says that the recovery of damages by a shipper on account of a discriminatory rate involves a judicial inquiry of facts on the one hand and discretion in technical matters on the other, and that the commission, by reason of its more expert appreciation of the intricacies of transportation, is in a better position to reach a correct determination, and that its conclusion thus reached, being discretionary, may not be impeached in a proceeding by mandamus. It urges also the well-established rule that mandamus can not be used as an appeal or to perform the functions of a writ of error. To sustain its position here it relies largely upon the cases of *I. C. C.* v. *Waste Merchants' Association*, 260 U. S. 32, and particularly *Donner Steel Co.* v. *I. C. C.*, 285 Fed. 955, a decision of this court in which certiorari was denied.

We have, therefore, here a case in which the commission has found that appellant has been required to pay transportation charges which are unduly prejudicial to the extent of $15 per car; that appellant's competitors enjoyed a $15 less per car rate, and that appellant was forced to base its price on its competitors' price and itself absorb the $15 unlawful charge, but in which the commission nevertheless refuses to award reparation.

The interstate commerce act (U. S. C. A., tit. 49) in section 3 makes it unlawful for a common carrier to subject a shipper "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and section 8 makes the carrier which shall do so liable to the person injured for the full amount of damages sus-
56 tained in consequence of such violation. It gives such person (section 9) the right to recover either before the commission or in the Federal courts but requires an election of forum. If the election is to proceed before the commission, the person injured is required to state the facts, upon which it becomes the duty of the commission, unless reparation is voluntarily made, to investigate the complaint and likewise to make an award of reparation if after hearing it shall determine the shipper was damaged.

Section 16 (1) is as follows:

"If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

From what we have already said, it is obvious that in this case appellant has shown,and the commission has found, the violation of law complained of, and likewise that appellant had sustained an

injury and pecuniary loss by reason of the injury to the extent of $15 for each car of lumber shipped within the statutory period. In these circumstances it would seem to us that there is no ground upon which refusal on the part of the commission to enter the order for reparation can be sustained. But the contrary of this is nevertheless urged, and it is insisted that the commission having said that appellant is not entitled to reparation, that question is foreclosed and to award the writ would be to require it to make an award contrary to its judgment and discretion. In other words, that its determination of the fact is the exercise of a jurisdiction conferred upon it by law, and that to challenge this by mandamus would be to convert the writ into an appeal or writ of error, which it has been repeatedly held may not be done.

But this reasoning does not appeal to us. The object and purpose of the act are clear. It was passed to require not only just and reasonable railroad rates but also to preserve to shippers equal competition by the maintenance of equality of rates and thus equality of opportunity, and so in a case in which, as in this, the question is one of competitive rates or charges discriminatory as between shippers in the same territory, gives power to the commission, when such a charge is sustained, to do two things—to require the carrier to cease and to require it to make reparation to the injured shipper. It is quite true that the act gives the commission wide latitude and great powers, and properly so, and it is equally true that in a proceeding of this nature a court will not review the decision of the commission on the merits or compel a particular exercise by the commission of its judgment or discretion, but where the commission has exercised all of its jurisdiction and exhausted all its discretion and has made a definite, conclusive, understandable finding of facts, including the fact of damage and the fact of loss sustained thereby, the question is not one of those stated above but is rather whether in such circumstances the writ is one to require the commission to perform a specific duty prescribed by the act. We think it is, and we likewise think that to reach a different conclusion would require us to confess our impotency to correct a judgment of the commission based on a conclusion not only unsupported by facts but directly in the teeth of its own findings of facts. This we are unwilling to do.

57 But it is insisted by the commission that this is just what we did do in the *Donner Steel Co. case, supra.* That there is a similarity between that and this case is undeniable, and in deciding that case we expressed our disapproval with the conclusion we felt obliged to reach. It therefore has no very great margin, and we are not disposed to increase it. But, without regard to this, we think

that the cases are easily distinguishable. The *Donner case* involved a service performed by the carrier of "spotting" cars, and in which it was alleged that the service was performed for some and denied to others, and this practice the commission found prejudicial and in violation of section 3 of the act, but the commission also found that the complainant there had not shown that its profits would have been any greater had the existing discrimination and prejudice been removed, "or that it has suffered any damage of which such discrimination and prejudice are the proximate cause." Our conclusion in refusing to order the writ to issue was based on the ground that the commission had definitely and unmistakably decided from the evidence before it that the shipper had not been damaged, and it is interesting to note that after our decision a petition for rehearing was granted by the commission in which the shipper asked a reconsideration by the commission of this question of fact. The ground of asking was the apparent inconsistency between the conclusion and that in *Buffalo Union Furnace Co.* v. *L. S. & M. S. Ry. Co.*, 44 I. C. C. 267. In its decision again denying the shipper's claim for reparation, the commission distinguished the facts in the *Buffalo case* from those in the *Donner Steel case*, pointing out that in the former case it was shown that the shipper was compelled to absorb the cost of certain terminal switching out of its profits and that from this it "inevitably" followed that the shipper suffered a loss in profits measured by the cost of this switching service, and therefore was damaged to that extent, but this, the commission said, was not true in the *Donner case*.

Here, as we have already seen, the facts found by the commission are in all respects similar to those found in the *Buffalo Union case*, and therefore the instant case differs from the *Donner Steel case* in the same respect as the *Buffalo Union case* differed from that case. This makes it apparent that the *Donner case* does not control this.

Nor is there anything in *I. C. C.* v. *Waste Merchants Association*, *supra*, which may be considered as controlling our decision here. That case and this are wholly different. There, as the Supreme Court said, the rates were neither unreasonable nor discriminatory nor in violation of the act. The conditions there found were an incident of the World War. The arrangement for loading was voluntary and beneficial to the shipper. There was no provision in the tariffs for the allowance to shippers who themselves loaded their cars. Since, therefore, neither of the cases relied on by the commission controls the decision here, we are free to answer the question as we think it should be answered.

If we should hold that the commission may not be required to reach a conclusion consonant with its own findings, section 16 of the

act would, we think, be meaningless. It would be to construe the language of the section—"If the commission shall determine that any party complainant is entitled to an award of damages"—to 58 mean that the discretion of the commission—to "determine"—was not subject to challenge on any ground and that the commission's *ipse dixit* would control against the plain mandate of the act. We think this is not the law.

In this case the commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss. In these circumstances nothing more is necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car. If there is any other element entering into the computation of damages which might change this result, there is nothing in the commission's findings of facts to indicate it. The statement is made by the commission that appellant's prices are fixed by the prices of its competitors who enjoy the $15 preferential. If this were not true, or if appellant's prices were only partially so controlled, a different case might be made, and in such circumstances appellant's loss would be computed on a different basis. But nothing of this sort appears, and the only suggestion of justification for the commission's refusal to make the award, and this was made in the argument, is that appellant in producing its lumber may have an advantage of operating and labor cost which its competitors do not have. We do not think this fact, even if it be true, would reduce appellant's recoverable damages under the statute. In such circumstances, in view of the finding of equality of price with its competitors, its profits would have been greater to the extent of its lower cost of production; but when, on the other hand, as appears from the findings of fact, it was required to reduce its profits $15 per car by the prejudicial rate it was forced to pay, the latter figure in the circumstances necessarily represents its damages, since obviously otherwise its profits would have been that much more.

Hence it follows that the determination of the commission that reparation should not be awarded is a mere conclusion contrary to its own findings of fact and therefore contrary to the provisions of the act. In such a case the granting of the writ is not the control of a particular discretion or a substitution of the judgment of this court for that of the commission but a lawful order to the commission to carry into effect the plain result of the exercise by it of its discretion—a situation in all respects analogous to an order to an inferior court to sign a judgment which it rendered but refused to sign. Any other conclusion than this, it seems to us, would be an anomaly and would amount to saying that an essential duty of the commission is beyond review, for appellant has no other remedy. (*Procter & Gamble* v. *United States*, 225 U. S. 282.)

We think the lower court was in error in refusing to issue the writ, and the case will be remanded with instructions that the judgment be set aside and the writ issue to the commission requiring it to assess the damages sustained in accordance with the provisions of the act and to enter the appropriate order thereon.

Reversed and remanded.

A true copy.

Teste:

Clerk, Court of Appeals, D. C.

59 Monday, January 30th, A. D. 1933

* * * * * * *

No. 5816, January Term, 1933

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

vs.

THE INTERSTATE COMMERCE COMMISSION

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed and that this cause be, and the same is hereby remanded to the said Supreme Court with instructions that the judgment be set aside and the writ issue to the Commission requiring it to assess the damages sustained in accordance with the provisions of the act and to enter the appropriate order thereon.

Per Mr. Justice GRONER.

JANUARY 30, 1933.

60 In the Court of Appeals of the District of Columbia

No. 5816, October Term, 1932

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE

APPLICATION FOR STAY OF MANDATE

Now comes the Interstate Commerce Commission, appellee in the above-entitled cause, by counsel, and moves the Court, under Rule No. XXIV of the Rules of the Court of Appeals of the District of Columbia, to stay the mandate in said cause pending application to the Supreme Court of the United States for a writ of certiorari.

DANIEL W. KNOWLTON,
E. M. REIDY,
Attorneys for Appellee.

Acknowledgment of service

Service of copy of the above application for stay of mandate is admitted this 2nd day of February, 1933.

A. HENRY WALTER,
Attorney for Appellants.

(Endorsed:) 5816. United States of America ex rel. J. C. Campbell et al., appellants, *vs.* the Interstate Commerce Commission. Application for stay of mandate. Court of Appeals, District of Columbia. Filed February 4, 1933. Henry W. Hodges, clerk.

61 Saturday, February 4th, A. D. 1933

* * * * * * *

No. 5816

U. S. EX REL. J. C. CAMPBELL, ET AL., APPELLANTS

vs.

THE INTERSTATE COMMERCE COMMISSION

On consideration of the motion to stay the mandate herein under Rule 24 pending application for certiorari, it is ordered that the motion be, and it is hereby, granted.

62 In the Court of Appeals of the District of Columbia

No. 5816, October Term, 1932

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE

DESIGNATION FOR TRANSCRIPT ON APPLICATION FOR WRIT OF CERTIORARI

The clerk will please prepare a transcript on application for writ of certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of the cause.
3. Opinion of the court.
4. The judgment.
5. Application for stay of mandate and minute entry allowing the same.
6. This designation.
7. Clerk's certificate.

DANIEL W. KNOWLTON,
E. M. REIDY,
Attorneys for Appellee.

Acknowledgment of service

Service of a copy of the above designation is admitted this 2nd day of February, 1933.

A. HENRY WALTER,
Attorney for Appellants.

(Endorsed:) 5816. United States of America ex rel. J. C. Campbell et al., appellants, *vs.* the Interstate Commerce Commission. Designation of record. Court of Appeals, District of Columbia. Filed February 4, 1933. Henry W. Hodges, clerk.

63 Court of Appeals of the District of Columbia

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 62, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of United States of America on

the Relation of J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a partnership, appellants, *vs.* Interstate Commerce Commission, No. 5816, January term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 4th day of February, A. D. 1933.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed March 20, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

FILE COPY

Office Supreme Court,
FILED
MAR 3 1933
CHARLES ELMORE CROPLEY

No. 748

In the Supreme Court of the United States

OCTOBER TERM, 1932

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, J. R. CAMPBELL, C. W. AMSLER, AND HENRY AMSLER, TRADING AS THE BIRCH VALLEY LUMBER COMPANY, A PARTNERSHIP, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For Interstate Commerce Commission.

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166313—33——1

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In the Supreme Court of the United States

No. —

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a partnership, respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

PETITION

The Interstate Commerce Commission, petitioner herein, prays that a writ of certiorari issue in accordance with the provisions of subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925, (c. 229, 43 Stat. 936, 938) to review a judgment of the Court of Appeals of the District of Columbia entered January 30, 1933, in a case entitled *United States of America ex rel. J. C. Campbell, et al.,*

Appellants v. *Interstate Commerce Commission, Appellee,* No. 5816. (R. 59.) That judgment reversed a judgment of the Supreme Court of the District of Columbia which had dismissed a petition for a writ of mandamus to compel the Commission to award damages for a violation of the Interstate Commerce Act, and which the Commission had declined to award on the ground that "the record will not support an award of reparation based on the undue prejudice found to exist." (R. 36.)

Question presented

Whether the writ of mandamus will lie to compel the Interstate Commerce Commission, in a proceeding in which it has taken jurisdiction and exercised the authority duly conferred upon it by statute, to make an award of reparation in favor of a complainant, where the Commission finds that such complainant has been subjected to the exaction of charges which are unduly prejudicial as to it, and concerning which charges the Commission further finds that "the record will not support an award of reparation based on the undue prejudice found to exist". (R. 36.)

Statute involved

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix, *infra,* pages 18 to 23.

Statement of the case

The controversy had its inception in a complaint filed on January 11, 1927, by the Birch Valley Lumber Company, wherein it alleged that the rates charged for transporting lumber and other forest products from Tioga, W. Va., to various destinations in the United States, were and are unreasonable, and unduly prejudicial and preferential, in violation of Sections 1 and 3 of the Interstate Commerce Act. (R. 29.) In the hearings before the Commission it was shown: That the Strouds Creek & Muddlety Railroad Company, hereinafter called the S. C. & M., is a short line railroad serving Tioga and Delphi, W. Va., where the plants of the Birch Valley Lumber Company and the Delphi Lumber Company, respectively, are located (R. 30); that Tioga is 7.1 miles and Delphi 9.5 miles from Allingdale, W. Va., where the S. C. & M. connects with the Baltimore & Ohio Railroad Company (R. 30); that the S. C. & M., for performing the haul from Tioga or Delphi to Allingdale receives $15 for each car of lumber transported, which is prepaid by the shipper (R. 30); that, for rate-making purposes, the Baltimore & Ohio has divided the lumber producing territory tributary to its line into groups, Allingdale being in what is known as the Richwood group (R. 30); that the Birch Valley Lumber Company competes in the sale of its products with mills at Fenwick, Gauley Mills, Midvale, Suncrest and Pickens, W. Va., all local points on the B. & O.,

and from which the district or group rates applied (R. 30); that all points in the Richwood group either on the main line of the B. & O. or on any of its branches, receive the benefit of the group rate (R. 30), and that higher rates are exacted by the B. & O. from points on its short line connections. (R. 30.)

The Lumber Company requested the Commission to establish through routes and joint rates from Tioga and Delphi which would not exceed the district basis of rates, and asserted that because of competition it is forced to absorb the $15 charge of the S. C. & M., by reason of which fact it could not compete on as favorable terms as its competitors. (R. 29.) The record showed that for the last half of the year 1926 a total of 565 cars moved from points on the S. C. & M. to various destinations. (R. 29.)

In the Commission's accompanying report of May 29, 1928, (144 I. C. C. 419) after some discussion of the evidence introduced by the B. & O. in defense of its rates as reasonable and of the principles of law applicable in a case of this kind, it (R. 32–36) made the following ultimate finding:

> We find that the rates assailed, in so far as they apply within the United States, were not and are not unreasonable but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded,

> exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va. *The record will not support an award of reparation based on the undue prejudice found to exist.* (Italics supplied.) (R. 36.)

On the same day, May 29, 1928, the Commission directed the carriers to cease and desist, on or before August 15, 1928, and thereafter to abstain from practicing the undue preference and prejudice found to exist, and to establish, maintain and apply regulations and practices which would prevent and avoid such undue prejudice and preference. (R. 37–42.) Upon the filing of a petition for reconsideration the Commission suspended the effective date of its order indefinitely. The petition for reconsideration was denied on November 1, 1928, and the order became effective on January 14, 1929. (R. 8.) On July 30, 1930, a petition by the Lumber Company seeking rehearing before the full Commission was filed, and on February 2, 1931, such petition was denied. (R. 9.)

The case was submitted to the Supreme Court of the District of Columbia upon the petition and exhibits thereto attached, the answer of the respondent to the petition and the demurrer to said answer. There were included as exhibits to the petition the complaint before the Interstate Commerce Commission, the report and order of the Commission, and the order of February 2, 1931, denying rehear-

ing. On October 4, 1932, said Court entered judgment overruling the demurrer and dismissing the petition. (R. 50.)

On the appeal that judgment was reversed by the Court of Appeals of the District of Columbia, (R. 53–59) the accompanying opinion holding in substance that the Commission's conclusion that the record would not support an award of reparation based on the undue prejudice found to exist was inconsistent with its findings of fact, and that, because the shipper has no other remedy, mandamus is appropriate.

Reasons for granting the petition

The reasons relied upon by the petitioner for the issuance of a writ of certiorari and upon which petitioner believes this petition ought to be granted are as follows:

1. The case involves a question of general importance;

2. The decision of the Court of Appeals of the District of Columbia is in conflict with prior decisions of that Court, and inconsistent with analogous decisions of this Court.

BRIEF IN SUPPORT OF PETITION

Opinions

The opinion rendered by the Supreme Court of the District of Columbia simply stated that the case was controlled by *Donner Steel Company* v.

Interstate Commerce Commission, 52 App. D. C. 221, and *Interstate Commerce Commission* v. *United States ex. rel. Capital Grain & Feed Company,* 59 App. D. C. 118. (R. 50.) The opinion by the Court of Appeals has not been published but will be found on pages 53–59 of the record.

Jurisdiction

The order of the Supreme Court of the District of Columbia denying the petition for a writ of mandamus was entered October 4, 1932. (R. 50.) From this order an appeal was prosecuted to the Court of Appeals of the District of Columbia, which on January 30, 1933, made its orders and handed down its opinion reversing the judgment of said lower court. (R. 59.) The jurisdiction of this Court is invoked under subsection (a) of Section 240 of the Judicial Code as amended and reenacted by the Act of February 13, 1925. (C. 285, 43 Stat. 936, 938.)

Statement of the case

The Court is respectfully referred to the statement of the case contained in the petition for writ of certiorari above given.

The statutes

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix, *infra,* pages 18 to 23.

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ARGUMENT

1. The case involves a question of general importance

A more important question in the field of Federal regulation can not be readily conceived than that of whether the Interstate Commerce Commission, in a proceeding in which it has taken jurisdiction and exercised the authority duly conferred upon it by statute, can be compelled by mandamus to make an award of reparation in favor of a complainant whom the Commission finds has been subjected to the payment of charges which are unduly prejudicial as to it, and where the Commission makes the further finding that "the record will not support an award of reparation based on the undue prejudice found to exist". (R. 36.)

It has been settled by this Court that the determination by the Commission as to whether or not a shipper has been wronged by the exaction of an unreasonable or discriminatory rate involves the exercise of judgment or discretion. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. Likewise, it has been settled by decisions of this Court that, before a party can recover damages for a violation of the Act, it is not sufficient to show merely the wrong of the carrier; it must be also shown that such wrong has resulted in injury to the person seeking damages. *Parsons* v. *Chicago & North Western Ry. Co.*, 167 U. S. 457, 460. The theory of the Court of Appeals appears to be that, after the Commission had found that

the Lumber Company had been unduly prejudiced by the payment of charges from Tioga higher than were collected on like traffic from the Allingdale group, the complainant was entitled as a matter of law and regardless of whether it had been damaged in the premises, to an award of reparation measured by the amount that the Tioga rates exceeded the contemporaneously applicable Allingdale group rates. This holding, however, in our opinion conflicts with the decision of this Court in *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, a decision greatly relied on by petitioner in the Court of Appeals, and which that Court in its opinion fails to mention.

In that case the coal company proved that during the period of time extending from April, 1899, to April, 1901, it and its competitors paid to the carrier the same rates for the transportation of coal from points in the Clearfield district, Pennsylvania, to certain destination points, and that, while the carrier afterwards refunded to said competitors certain percentages of the rates paid by them, it refused to make like refunds to the coal company. The latter contended that it was entitled to recover the amount of the refunds the carrier had refused to pay, and this contention was upheld by the Circuit Court and the Circuit Court of Appeals. In reversing the judgment of the latter court, this Court said:

> The statute gives a right of action for *damages* to the *injured* party, and by the

> use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and everyday instances suggested by testimony in this record. (Id. 204.)

After showing the results which would follow from the application of the rule contended for by the coal company, the Court used the following language:

> To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of

the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid. (Id. 206.)

* * * * *

In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to grant a new trial. (Id. 207–208.)

It thus appears to us that the question of damage presented to the Commission for determination was not one of law, but one of fact; and that, in the exercise of its jurisdiction, the Commission determined that question, after an exercise of the discretion necessarily involved in such a determination.

2. The decision of the Court of Appeals of the District of Columbia is in conflict with prior decisions of that Court, and inconsistent with analogous decisions of this Court

It seems clear to the petitioner that the action of the Court of Appeals in directing the writ of mandamus to issue under the circumstances of this case is to compel the Commission to award reparation contrary to its judgment and discretion; in other words, to convert the writ into performing the functions of an appeal or a writ of error, which this Court has repeatedly held may not be done.

In *Interstate Commerce Commission* v. *Waste Merchants' Association,* 260 U. S. 32, this Court held that mandamus would not lie to compel the Commission to set aside its decision denying reparation to certain shippers by certain carriers because of loading services which, it was claimed, the carrier failed to perform under its tariffs, and which the shippers were thus obliged to perform. In disposing of the case, this Court said:

> We have no occasion to consider the merits of the controversy before the commission.

That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. It found that the rates charged were not unreasonable or discriminatory in violation of the commerce act, nor unreasonable for the service actually performed, in violation of the Federal control act. It found that the conditions complained of were an incident of the World War; that the arrangement for loading was a voluntary one beneficial to complainants' members; that there was no provision in the tariffs for allowance to shippers who load cars; and that, therefore, such allowance could not legally be made by the carriers. The commission dismissed the complaint because it held that the petitioners were not entitled to relief. *Waste Merchants' Association* v. *Director General,* 57 I. C. C. 686.

Petitioners sought in the proceeding to set aside the adverse decision of the commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus can not be had to compel a particular exercise of judgment or discretion. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fisher,* 223 U. S. 683; *Hall* v. *Payne,* 254 U. S. 343; or be used as a writ of error, *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522. The case at bar is not like *Interstate Commerce Commission* v. *Humboldt S. S. Co.* 224 U. S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commis-*

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> *sion,* 246 U. S. 638, where the commission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178, where the commission wrongly refused to perform a specific peremptory duty prescribed by Congress. (Id. 34–35.)

In *Donner Steel Company* v. *Interstate Commerce Commission,* 285 Fed. 955, the Court of Appeals of the District followed this Court's ruling in the *Waste Merchants' case, supra.* In the course of its opinion in the *Donner Steel case,* the Court of Appeals held:

> * * * It is too well settled to require discussion that the writ of mandamus cannot be converted into a writ of error, for the purpose of reviewing errors of law committed by a tribunal whose jurisdiction to make the order or judgment complained of is conceded. * * *

A motion for writ of certiorari to review this decision was denied by this Court. (270 U. S. 651.) There is a close analogy between the *Donner Steel Company case,* and this case, which the Court of Appeals in its decision herein has recognized. (R. 56.)

In the *Donner Steel Company case* (57 I. C. C. 745) the Commission found no violation of Section 1 of the Act, but did find that the practice of the carriers in spotting cars, or making allowances

therefor, to complainant's competitors in the Buffalo rate district "has been, is, and for the future will be, unduly prejudicial to complainant, in violation of Section 3 of the Act." The commission further found (p. 752) that the Steel Company had not "shown that its profits would have been any greater had the existing discrimination been removed, or that it has suffered any damage of which such discrimination and prejudice are the proximate cause." The efforts of the Donner Steel Company to get this alleged inconsistency corrected by mandamus were unsuccessful. (See 285 Fed. 955; 270 U. S. 651.)

In the *Birch Valley Lumber Company case* (144 I. C. C. 419) the Commission found that the rates attacked "were not and are not unreasonable" (R. 36), in violation of Section 1 of the Act, but that such rates "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va." (R. 36), that is, that they violated Section 3. For this violation of the Act, the Commission found, as it found in the *Donner Steel case,* that "the record will not support an award of reparation based on the undue prejudice found to exist." (R. 36.)

In our view, two situations could hardly be more identical, and it is submitted that the same result, the dismissal of the petition, should be reached in this case as was reached in the *Donner Steel Company case*. There is no showing here, any more than there was in the *Donner Steel Company case*, that respondent's profits would have been any greater had the existing discrimination been removed. The mere statement of the Commission, emphasized by respondent, that "there appears to be no question that complainant and intervener are forced to base their prices on the group rates and absorb the charges of the S. C. & M." (R. 36) is not the clear and definite showing of injury necessary to support an award of reparation, especially when it is considered in connection with the prior statement of the Commission, that "mills on the other short lines are not shown to fix the prices at which complainant sells its lumber" (R. 36). For aught that appears, respondent's operating and labor costs as well as other costs incurred by it in producing its lumber, may be such that, even with the additional $15 charge it had to pay to the S. C. & M., it could still do business on even terms with its competitors. The record upon which the Commission based its order is not before the Court. Under these circumstances, this Court has held that the Commission's findings, which would include its finding that "the record will not support an award of reparation based on the undue prejudice found

to exist," must, in the absence of the evidence, be deemed to be in accord with the evidence. (See *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 116; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 125.)

It is also believed that the decision of the Court of Appeals is in conflict with its decisions in *Bartlesville Zinc Company* v. *Interstate Commerce Commission,* 30 Fed. (2d) 479, certiorari denied 279 U. S. 856, and *Interstate Commerce Commission* v. *United States ex rel. Capital Grain & Feed Company,* 35 Fed. (2d) 1012.

Finally, it will be observed that the order of the Commission complained of in this proceeding is what is known as a negative order, the Commission, after hearing and in accordance with the pertinent facts as found by it, having declined to award the reparation asked for by respondent. Compare *Procter & Gamble Company* v. *United States,* 225 U. S. 282. Orders of this kind have been heretofore regarded as nonreviewable and unless the petition is granted and the decision of the lower court corrected, petitioner believes that great confusion will result from the decision of the Court of Appeals in this case.

For the foregoing reasons it is respectfully submitted that the petition should be granted.

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For Interstate Commerce Commission.

MARCH, 1933.

APPENDIX

The Interstate Commerce Act provides:

Section 1 (5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

Section 3 (1):

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 6 (1):

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own

route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Section 8:

That in case any common carrier subject to the provisons of this Act shall do, cause to be done, or permit to be done any act, matter,

or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any

such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 13 (1):

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15 (1):

That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected, by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist,

and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 16 (1):

That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

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CHARLES ELMORE

No. 748

In the Supreme Court of the United States

OCTOBER TERM, 1932

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, J. R. CAMPBELL, C. W. AMSLER, AND HENRY AMSLER, TRADING AS THE BIRCH VALLEY LUMBER COMPANY, A PARTNERSHIP, RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For Interstate Commerce Commission.

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In the Supreme Court of the United States

No. 748

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a partnership, respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

OPINIONS

The memorandum opinion of the Supreme Court of the District of Columbia denying the petition for writ of mandamus stated that this case was controlled by *Donner Steel Company* v. *Interstate Commerce Commission,* 52 Appeals D.C. 221, and *Interstate Commerce Commission* v. *United States ex rel. Capital Grain & Feed Company,* 59 Appeals D.C. 118 (R. 50). The opinion of the

Court of Appeals of the District, reversing that of the Supreme Court, has not been published, but will be found on pages 53–59 of the record. The Commission's report is entitled Docket No. 19191, *Birch Valley Lumber Company* v. *Strouds Creek & Muddlety Railroad Company et al.*, 144 I.C.C. 419, and appears at pages 28–37 of the record.

JURISDICTION

By petition filed June 20, 1932, respondent sought from the Supreme Court of the District of Columbia a writ of mandamus compelling petitioner, Interstate Commerce Commission, to determine the amount of damages sustained by respondent in consequence of certain violations of the Interstate Commerce Act. The judgment of the Supreme Court of the District of Columbia dismissing said petition was entered on October 4, 1932 (R. 50), and upon appeal this judgment was reversed by the Court of Appeals of the District of Columbia (R. 59).

The Commission filed its petition for writ of certiorari under subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938) and said petition was granted by this Court March 20, 1933 (R. 63).

QUESTION

The Commission, having taken jurisdiction of a complaint against rates, found that, while said rates were not unreasonable, they caused undue

prejudice and preference, warranting issuance of an order for removal thereof; but further found that the record would not support an award of damages based on the undue prejudice. The ultimate question here raised is whether the Court of Appeals of the District of Columbia did not err in concluding that mandamus would lie to compel the Commission to reach a different judgment and issue an award of damages. A subordinate question is whether said court did not err in holding that certain preliminary statements of fact by the Commission were conclusive on the question of damage, leaving nothing more to be done than to multiply "the number of cars by the ascertained overpayment per car", and, therefore, rendering the Commission's determination that the record would not support an award of damages a conclusion contrary to its own findings.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379), as amended by the Transportation Act of 1920 (41 Stat. 456) provide:

> Section 1 (5): All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibted and declared to be unlawful: * * *.

Section 3 (1): That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 6 (1): That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of

freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Section 8: That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every

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case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9: That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 13 (1): That any person, firm, corporation, company, or association, or any

mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15 (1): That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint

whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission

other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 16 (1): That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

STATEMENT OF THE CASE

Proceedings before the Commission

The controversy had its inception in a complaint filed on January 11, 1927, by the Birch Valley Lumber Company, designated Docket No. 19191, wherein it alleged that the rates charged for transporting lumber and other forest products from Tioga, W.Va., to various destinations in the United States and eastern Canada, including eastern Trunk Line, New England and Central Territories (R. 18), were and are unreasonable, and unduly prejudicial and preferential, in violation of Sections 1 and 3 of the Interstate Commerce Act (R. 29). In the hearings conducted by the Commission following the filing of the complaint and

the answers of the railroad companies thereto, it was developed, among other things: That the Strouds Creek & Muddlety Railroad Company, hereinafter called the S.C. & M., is a short line railroad serving Tioga and Delphi, W.Va., where the plants of the Birch Valley Lumber Company and the Delphi Lumber Company, respectively, are located (R. 30); that Tioga is 7.1 miles and Delphi 9.5 miles from Allingdale, W.Va., the junction point of the S.C. & M. with the Baltimore & Ohio Railroad, hereinafter called the B. & O.; that for rate-making purposes, producing territory tributary to the B. & O. in West Virginia, Pennsylvania, and Maryland was divided into several groups, from each of which so-called district or group rates were maintained from all stations on the main and branch lines of the B. & O., whereas (with some exceptions in certain of the groups (R. 32)) rates from origins on independent short lines were made on a combination of the locals to the junction points plus the group rate beyond; that Allingdale, said junction of the S.C. & M. with the B. & O., was, for example, located in what is called the Richwood Group as to traffic destined to trunk-line territory, and in Group 9 as to traffic destined to central territory; that the S.C. & M., for performing the haul from Tioga or Delphi to Allingdale, received $15 per car which was prepaid by the shipper and was in addition to the group rate, applicable from Allingdale, to whatever might be the destination beyond;

that complainant's lumber was sold in competition with that produced throughout the country and especially that produced in the same general territory, its principal competitors being mills located at Gauley Mills, Fenwick, Midvale, Suncrest, and Pickens, W.Va., which were stations on the B. & O. from which the group rates applied (R. 30).

The complainant lumber company asked that the carriers be required to establish joint rates from Tioga and Delphi not to exceed the group basis, asserting that because of competition it was forced to absorb the $15 charge of the S.C. & M., by reason of which fact it could not compete on as favorable terms as its competitors. Reparation on past shipments was also sought (R. 29). Said company's prices are quoted f.o.b. Allingdale, W.Va. Its markets are various points in Canada, Kentucky, Illinois, Michigan, Ohio, Pennsylvania, New York, New Jersey, Maryland, and the New England States (R. 29, 18). During the last half of the year 1926, a total of 565 cars moved from stations on the S.C. & M., 197 whereof were destined to points in Pennsylvania, 128 to West Virginia, 86 to Ohio, 71 to Kentucky, 26 to New York and the remainder to various other States. (R. 29).

At the hearings the lumber company introduced, among other things, exhibits comparing the rates from said stations on the S.C. & M., and the earnings per car, with those from various points in the same general territory, including points in West

Virginia on the West Virginia Northern and points in Maryland on the Cumberland & Pennsylvania and on the Western Maryland, at which competing mills were located (R. 19) and from which group or district rates applied, the same in level as the rates applicable from junction points of said roads with the B. & O. (R. 31). The Commission discusses said rate comparisons in its report and sets forth illustrative examples thereof in an appendix (R. 36, 37). The report further discusses exhibits of the B. & O., comparing the group rates from Allingdale with those applicable from the various groups surrounding said point, and also decisions of the Commission pointed to by the B. & O. in support of the reasonableness of the rates involved and of its policy not to extend to points on connecting lines the group or junction-point rate except when compelled to do so by competition.

On the question of said policy of the B. & O. the Commission considered that its decision in the so-called *Swift Lumber Company case,* 61 I.C.C. 485, was governing. In that case there was a large area in Mississippi from all stations within which on the main or branch lines of the Illinois Central rates on lumber moving to northern markets were the same, whereas from stations on independent connecting lines, including Knoxo on the Fernwood & Gulf, rates were higher, they being, as in the instant case, made on a combination of the locals to the junction points plus the group rate beyond. On

findings that the rates from Knoxo were not unreasonable, but that they subjected the Swift Lumber Company, located at Knoxo, to undue prejudice, the Commission ordered the carriers to desist from charging rates higher from Knoxo than from the other points in the territory; and its said order was upheld by this Court in *United States* v. *Illinois Cent. R. R.*, 263 U.S. 515.

The Commission's report in the instant case comments on the *Swift Lumber Company case,* as follows:

> In that case as here it was the policy of the principal trunk-line defendant to not extend the junction-point or group rates to points on short-line connections. The Illinois Central system had eight such connections, and none of them were accorded the blanket rates. Here also the B. & O. has not extended the group rates to points on other short lines in the same group, but in other near-by groups taking slightly lower rates the junction-point or group rates are applied from points on certain short lines and a trunk-line connection of the B. & O. The latter contends that this is due to competition, although it is the only carrier which connects with one of the short lines. A similar contention was made by the Illinois Central with respect to its participation in joint rates from points on certain short-line connections of other carriers. The Swift Lumber Company's competition in that case was

> not shown to be with any particular mills and was not confined to those in the blanket territory. In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the junction-point or group rates apply from points on certain short-line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant and intervener are forced to base their prices on the group rates and absorb the charges of the S.C. & M. (R. 35).

After mentioning the fact that the decision in the *Swift Lumber case* had been sustained by this Court, as aforesaid, and that it had been since generally followed in many cases, the report concludes with the following:

> We find that the rates assailed, in so far as they apply within the United States, were not and are not unreasonable but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W.Va. ***The record will not support an award of reparation based on the undue prejudice found to exist.*** (Italics supplied.) (R. 36.)

A further similarity between the instant case and the *Swift Lumber Company case, supra,* is that in the latter case, too, reparation was denied.

This decision was by a division of the Commission, consisting of three members, one of whom could not agree with the majority that there was any basis for a finding of undue prejudice[1] (R. 36).

By its order entered on the same day as its report, May 29, 1928, the Commission directed the carrier defendants to cease and desist, on or before August 15, 1928, and thereafter to abstain from practicing the undue preference and prejudice found to exist, and to establish, maintain, and apply regulations and practices which would prevent and avoid such undue prejudice and preference (R. 37–42). Other than the S.C. & M., the railroad defendants were dissatisfied with the finding and order of the Commission, and filed a petition for reconsideration and reargument on July 5, 1928. Pending action on this petition the Commission suspended the effective date of its order indefinitely. The petition for reconsideration was denied on November 1, 1928, and the order became effec-

[1] Section 17 (2) of the Interstate Commerce Act authorizes the Commission to form divisions, of not less than three members each, and paragraph (4) of that section provides that a determination of a division of the Commission has the same force and effect as a decision of the full Commission, reserving the right in the parties conferred by Section 16 (a), to have the decision reheard by the entire Commission if good cause appears therefor.

tive on January 14, 1929 (R. 8). On July 30, 1930, more than two years after the Commission's decision, the Birch Valley Lumber Company filed a petition seeking to have the entire Commission rehear the case, a reply in opposition thereto was filed by the carrier defendants other than the S.C. & M., and on February 2, 1931, the petition was denied (R. 9).

Proceedings in the lower courts

Between the date of the denial of its petition for rehearing by the Commission on February 2, 1931, and June 20, 1932, the lumber company took no action towards the correction of the Commission's alleged error. On the latter date it filed its petition for a writ of mandamus in the Supreme Court of the District of Columbia, praying:

> * * * that this honorable court issue its writ of mandamus commanding the respondent Commission to determine the full amount of damages sustained by the relators in consequence of the aforesaid violations of the Interstate Commerce Act as found by the Commission and described in Paragraph XIII hereof, the damage sustained by the relators being measured by such amount as the payments of charges to the said carriers on shipments by The Birch Valley Lumber Company, a corporation, and the relators, from Tioga, West Virginia, on and after the 11th day of January, 1925, exceeded the rates contemporaneously maintained on like

> traffic from the group which included Allingdale, West Virginia, * * *. (R. 10).

The case was submitted to the Supreme Court of the District of Columbia upon the petition for a writ of mandamus and exhibits thereto attached, the rule to show cause, the answer of the Interstate Commerce Commission, and the demurrer to said answer. On October 4, 1932, said Court entered judgment overruling the demurrer and dismissing the petition (R. 50).

On the appeal that judgment was reversed by the judgment of the Court of Appeals of the District of Columbia. The accompanying opinion held in substance that there was inconsistency between the Commission's findings of fact and its conclusion that respondent had not been damaged as a result of violations of the Interstate Commerce Act committed by the railroads, and as no other remedy was available, mandamus would lie to compel the Commission to make the award (R. 53–59).

ASSIGNMENT OF ERRORS

The Court of Appeals of the District erred in holding that mandamus was appropriate to compel the Commission to make an award of reparation in this case, contrary to its own judgment and discretion.

SUMMARY OF THE ARGUMENT

1. The Commission found that the rates were not unreasonable but that they caused undue pref-

erence and prejudice; and, accordingly, its regulatory order was directed to the removal of said undue preference and prejudice. Its determination in respect of the reparation asked for, that the record would not support an award on the undue prejudice found to exist, was exercise of judgment and discretion which cannot be controlled by mandamus. *Donner Steel Co.* v. *I.C.C.,* 285 Fed. 955.

The Commission's preliminary findings did not, as held by the lower court, include the finding of the fact of *damage* resulting from the discrimination and the amount of the loss, or otherwise so exhaust all its jurisdiction and discretion that the court could issue the writ "as one to require the Commission to perform a specific duty prescribed by the act." The finding that complainant was compelled to base its price on the group *rates* and absorb the charges of the S.C. & M. was not a finding that mills in its group, or groups, or even in the groups in the same general territory, controlled complainant's prices at the many markets in eastern trunk line and central territories, New England and eastern Canada. As to competition at said markets, the Commission found "that complainant's competition is mainly with mills in the same general territory." The obvious fact that complainant's "lumber is sold in competition with that produced throughout the country" was also covered by express finding (R. 30).

Unlike case where an unreasonable rate has been exacted and "the carrier ought not to be allowed to retain his illegal profit", the case was one "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less * * *. There the damage depends upon remoter considerations." *So. Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534. Damage does not necessarily follow from the rate discrimination; nor even were the fact of damage established as a "certain result of the wrong" (Cf. *Story Parchment Co.* v. *Patterson Co.*, 282 U.S. 555, 562), is its amount necessarily measured by the difference in rates. *Penna. R.R.* v. *International Coal Co.*, 230 U.S. 184.

2. In reaching its determination that the record would not support an award of damage, the Commission was guided by principles applied by the courts as to the proof necessary to sustain recovery. If, in any way, it gave erroneous effect to said principles, mandamus is not a proper remedy to correct the error. *I.C.C.* v. *Waste Merchants Assn.*, 260 U.S. 32.

ARGUMENT

Mandamus is not an appropriate remedy in this case

(1) Mandamus cannot be had to compel a particular exercise of judgment or discretion.

In *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, the Supreme Court said:

> The principles of law relating to the remedy by *mandamus* are well settled.
>
> It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.
>
> It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.
>
> It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error. (Id. 533–534).

It has been settled by this Court that the determination by the Commission as to whether or not a shipper has been wronged by the exaction of an unreasonable or discriminatory rate involves the exercise of judgment or discretion. In the case of *Great Northern Railway Company* v. *Merchants Elevator Company,* 259 U.S. 285, at page 291, the Court said:

> Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule, or practice shall be

> deemed reasonable for the future is a legislative or administrative function. *To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters;* and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. * * * (Italics supplied.)

Before a party can recover damages for a violation of the Interstate Commerce Act, there must be a clear showing of injury; it is not sufficient to show the wrong of the carrier, but it must be likewise demonstrated that such wrong has resulted in injury to the person seeking damages. This has been held by this Court in *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U.S. 447, 460, where it is said:

> * * * The only right of recovery given by the interstate commerce act to the individual is to the "person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act". So, before

> any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities. * * *.

Accordingly, whether in respect of the fact of damage, or its amount, determination of the question involves exercise of judgment and discretion. The lower court does not dispute this. Its decision that mandamus would lie to require the Commission to award damage, which the Commission had determined the record would not support (R. 36), rests on its view that said determination was a mere conclusion contrary to the Commission's own findings of fact; that the Commission had by its earlier findings exercised all its jurisdiction and exhausted all its discretion, including the making of the finding of the fact of damage and the fact of loss sustained thereby; and that, thus, the writ was "one to require the Commission to perform a specific duty prescribed by the Act" (R. 56). Further explaining this view the Court later said (R. 58):

> In this case the commission has found, as we have pointed out, unlawfulness of rate, injury, and damage, and the amount of loss. In these circumstances nothing more is

> necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car. If there is any other element entering into the computation of damages which might change this result, there is nothing in the commission's findings of facts to indicate it. The statement is made by the commission that appellant's prices are fixed by the prices of its competitors who enjoy the $15 preferential. If this were not true, or if appellant's prices were only partially so controlled, a different case might be made, and in such circumstances appellant's loss would be computed on a different basis.

But the Commission did not find either the fact of damage or the amount of loss. Nor did it find that respondent's prices were fixed by the prices of "its competitors who enjoy the $15 preferential." This is shown by the court's own statement of the Commission's findings, earlier summarized in its opinion as follows (R. 54):

> The commission found that appellant's competitors, having their mills within the Allingdale group and located on branch lines of the B. & O., paid only the Allingdale rate, which was $15 per car less than the charges exacted of appellant for the service from its mills to the same destinations. The result of this was that appellant was required to pay $15 more for each car of lumber shipped than its competitors. The commission likewise found that appellant's prices were all

> quoted f.o.b. Allingdale; that it sold its lumber in competition with that produced in the same general territory, and was forced to base its price on the group rates and to absorb the $15 per car charge of the Strouds Creek road. In these circumstances the Commission found that the through interstate rates exacted of appellant "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential to its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, West Virginia," and consequently entered an order requiring the railroads participating in transportation of appellant's lumber within the United States to cease and desist, etc. But the commission also found that "the record will not support an award of reparation based on the undue prejudice found to exist." The conclusion last stated is the bone of contention.

The Court appears to have mistaken the purport of the Commission's findings, thus abstracted by it, in at least three important particulars:

1. In repeatedly stating that the Commission found the fact of damage in face of the Commission's express finding that the record would not support an award, the Court may have considered that the finding of the fact of damage was comprehended in the Commission's finding of undue preju-

dice, which it sets out in quotations, namely, the finding that the rates "were, are, and for the future will be, unduly prejudicial to complainant." Findings of the Commission are frequently worded in the past, although only made in support of an order establishing rates for the future. Certainly such wording is not confined to cases where reparation is asked for and granted. The factual evidence on which the Commission establishes rates necessarily relates to the past, and if the fact of damage followed, as, of course, from the fact of undue prejudice in the past, there would be no need for proof of damage other than the unlawful rate relation.

2. The Court's statement that the Commission had found "the amount of loss" is plainly based on the fact that the rates were found to be unduly prejudicial to the extent that they exceeded the rates from the group which includes Allingdale, namely, the sum of $15, charged by the S.C. & M. to Allingdale, which constituted the difference between the rates paid by respondent and the rates of those of its competitors in the Allingdale group. But the rates from points on the S.C. & M., including said short line's $15 charge, are expressly found not to have been unreasonable (R. 36). In fact, said rates do not appear to have been attacked as unreasonable *per se,* but only as relatively high by comparison with the group rates (R. 33). It is plain that "where a party who has paid only a reasonable rate sues on a discrimination because some

other has paid less" (*So. Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534) the rate difference does not necessarily measure his damage, if any. *P.R.R.* v. *International Coal Co.*, 230 U.S. 184.

3. The lower court has taken the Commission's finding that respondent "was forced to base its price on the group rates and to absorb the $15 per car charge of the" S.C. & M. (R. 54) to read that respondent "was forced to base its price on its competitors' *price* and itself absorb the $15 unlawful charge" (R. 55). On this reading of the Commission's finding the lower court apparently bases its later statement, above given, namely, that:

> The statement is made by the Commission that appellant's prices are fixed by the prices of its competitors who enjoy the $15 preferential. If this were not true, or if appellant's prices were only partially so controlled a different case might be made, and in such circumstances appellant's loss would be computed on a different basis" (R. 58).

There seems to be no reason for reading said finding of the Commission to mean that respondents' prices were fixed, or controlled, by the prices of its competitors, either in the Allingdale group, or in the other groups in the general territory, from which lower rates obtained (R. 36–37). In respect of competition the Commission found that respondents'

> lumber is sold in competition with that produced throughout the country and especially

that produced in the same general territory (R. 30).

The Commission's report next reads:

> The principal competitors are said to be mills at Gauley Mills, Fenwick, Midvale, Suncrest, and Pickens, W.Va., which produce and manufacture the same grades of lumber as complainant and are located in the same general territory. These points are all on the line of the B. & O., and the district or group rates apply therefrom (R. 30).

The Commission's last findings as to competition was made when comparing the case with the *Swift Lumber Co. case, supra,* the facts of which it said were very similar. It reads (R. 35):

> The Swift Lumber Company's competition in that case was not shown to be with any particular mills and was not confined to those in the blanket territory. In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the junction point of group rates apply from points on certain short-line connections of the B. & O. (R. 35–36).

The above cannot be taken to mean more than it says, namely, that respondent's "competition is *mainly* with mills in the same *general territory.*" Since the Commission made the express finding that respondent's lumber was sold in competition with that produced throughout the country and, in view of the fact that the lower court attributes

conflict between the Commission's earlier statements of fact and its ultimate finding that the record would not support damage, it seems proper to again emphasize that respondent's lumber was sold in many markets in eastern trunk-line and central territories, in New England, and eastern Canada (R. 29), at which markets it is obvious that it met competition other than from its competitors in the Allingdale groups or in the other groups in the same general territory.

Further, in view of the conflict attributed by the lower court between the Commission's finding that the record would not support an award of reparation and its earlier finding of fact, it seems clear that, in the absence of that record, the alleged conflict should not be resolved against said determination of the Commission arrived at on that record. Compare *Spiller* v. *A. T. & S. F. Ry.*, 253 U.S. 117, 125.

It is believed that the lower court's misconception of the Commission's findings was largely due to its apparent view that damage to the respondent followed, as of course, when it was determined that it had been discriminated against to the extent of a named rate difference. This conflicts with the decision of this Court in *Pennsylvania R.R. Co.* v. *International Coal Co.*, 230 U.S. 184.

In that case the coal company proved that during the period of time extending from April 1899 to April 1901, it and its competitors paid to the car-

rier the same rates for the transportation of coal from points in the Clearfield district, Pennsylvania, to certain destination points, and that, while the carrier afterwards refunded to said competitors certain percentages of the rates paid by them, it refused to make like refunds to the coal company. The latter contended that it was entitled to recover the amount of the refunds the carrier had refused to pay, and this contention was upheld by the Circuit Court and the Circuit Court of Appeals. In reversing the judgment of the latter court, this Court said:

> The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record (Id. 204).

After showing the results which would follow from the application of the rule contended for by the coal company, the Court used the following language:

To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evildoers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid (Id. 206).

* * * * *

> In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to grant a new trial (Id. 207–208).

The lower court's opinion contains no discussion of the *International Coal case*. While said case involved a particuluar kind of discrimination, namely, departure from published rates through rebates to preferred shippers, which is rigidly prohibited and made a criminal offense, nevertheless, its rule in respect of certainty of proof of the fact of damage and its statements as to the measure of the amount of damage are patently applicable to the instant case. The court failed to distinguish between a case involving unreasonableness of rates where

> the carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. (*So. Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534)

and a case where the fact of damage depends upon remoter considerations. The distinction is pointed

out by this court in the *Darnell-Taenzer case, supra,* where it is said:

> The cases like *Pennsylvania R.R. Co.* v. *International Coal Mining Co.,* 230 U.S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.

In its early decisions, or some of them, the Commission proceeded upon the premise that its power was to award so-called "rate damage", that is, damage measured by the difference in rates in a discrimination case, and damage measured by the amount the rates exceeded a reasonable maximum in a section 1 case; and that it was without power to make awards of general or "legal" damage. *Joynes* v. *Pennsylvania R.R.,* 17 I.C.C. 361; *L. & N. R. R.* v. *Ohio Valley Tie Co.,* 242 U.S. 288. But following the decision in the *International Coal Case, supra,* the Commission has consistently held [2] that "proof of damage in undue prejudice cases

[2] See, among other cases, *Anadarko Cotton Oil Co.* v. *A., T. & S. Fe Ry. Co.,* 20 I.C.C. 43, 49; *Blackman & Griffin Co.* v. *A. C. & Y. Ry. Co.,* 49 I.C.C. 649, 655; *Knoxville Iron Co.* v. *L. & N. R.R. Co.,* 128 I.C.C. 513, 514; *Gallagher* v. *Penna.R.R.Co.,* 160 I.C.C. 563, 569; *Topeka Chamber of Commerce* v. *A., T. & S. Fe Ry. Co.,* 178 I.C.C. 725, 728.

must be by such evidentiary facts as would be required to sustain such a recovery before a court of law" (*Wright Lumber Co.* v. *A.A.R.R.Co.,* 112 I.C.C. 337, 339, 340).

That is not to say that in a section 1 case, involving rate unreasonableness, a Commission award could not include general damage as well as "rate damage." *L. & N. R.R.* v. *Ohio Valley Tie Co., supra.* But, even where it exists, such damage is remote from the wrong; whereas when rates have been found unreasonable to the extent that they exceed a named maximum, an amount certain has been established which, as retained by the carrier and withheld from the shipper, is an illegal profit to the one and an unlawful charge against the other. In preference to this the shipper, who suffered the loss *at least when he paid,* is allowed to recover, even though his damage, or part thereof, may have been passed on to consumers. On the other hand "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less", it will be seen that, even though the difference in rates may be determined with certainty, it does not necessarily follow that damage in that, or in any, amount has resulted from the wrong of the carrier. It must be constantly kept in mind that the wrong of the carrier is not that it charged an unreasonable rate but is that it failed to maintain equality of rates and,

therefore, that any damage to the suing party is not that the carrier has exacted, and is withholding from him, an illegal profit, but must be shown to have resulted from the unlawful relation that obtained, the one rate with the other.

Proof of such unlawful relation, that is, of undue preference and prejudice, is not of itself sufficient to establish damage, which is not presumed but must be proved; and even where the fact of damage is shown, the amount is not necessarily measured by the difference in the rates, but it may be greater or less or the same as said rate difference. *Mfrs. & Merchants Asso.* v. *A.&A.R.R.*, 37 I.C.C. 350, 351. Nothing in the Act to Regulate Commerce warrants a presumption of damage. *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I.C.C. 719, 722. Damage must be proved to have resulted from the wrong that was done, namely, from the fact that, although the party was charged only a reasonable rate, the carrier accorded another party a lesser rate for like transportation. In making such proof competition and control of the market are important factors. It is true that even though the parties were not engaged in competitive business, the one would be at a disadvantage with the other simply as a user of transportation; and under some circumstances such disadvantage could, too, be found to be "unjust" and "undue", at least as support for an order legislative in nature, that is, an order operating *in*

futuro. Cf. *L. & N. R.R.* v. *U.S.* (*Private Passenger Car case*), 282 U.S. 740, 749. And, where the parties were in fact engaged in competitive business, there is added support for an order to desist from the discrimination, because, among other things, a party, even though paying only a reasonable rate may by reason of his transportation disadvantage in relation to the rate of a competitor, be subjected to damage. But, as aforesaid, to warrant an award of damage, it must be shown to have resulted.

The Commission has held that "lost sales", when attributable to such a rate disadvantage, constitutes a sufficient showing of damage.[3] It has held, however, that the mere showing of "loss of profits",[4]

[3] *Coal Switching Reparation Cases at Chicago*, 36 I.C.C. 226, 231, 232; *H-O Cereal Co.* v. *A., T. & S. Fe Ry. Co.*, 100 I.C.C. 297, 299; *Knoxville Iron Co.* v. *L. & N. R.R. Co.*, 128 I.C.C. 513, 514; *Iten Biscuit Co.* v. *C., B. & Q. R.R. Co.*, 53 I.C.C. 729, 731; *Chicago Bridge & Iron Works* v. *Director General*, 85 I.C.C. 99–100; *Koenig & Co.* v. *B. & O. R.R. Co.*, 81 I.C.C. 683, 684; *Carnegie Steel Co.* v. *Director General*, 96 I.C.C. 527, 536–537; *Hylton Flour Mills, Inc.* v. *Los Angeles & S. L. R. Co.*, 152 I.C.C. 81, 83–84.

[4] *Coal Switching Reparation Cases at Chicago*, 36 I.C.C. 226, 228; *Wharton Steel Co.* v. *Director General*, 59 I.C.C. 11, 23–24; *Standard Oil Co.* v. *Director General*, 66 I.C.C. 37, 41–42; *Brooks Coal Co.* v. *Wabash R.R. Co.*, 39 I.C.C. 426, 432; *Badger Lumber & Coal Co.* v. *A., T. & S. Fe Ry. Co.*, 136 I.C.C. 350, 352; *Carnegie Steel Co.* v. *Director General*, 96 I.C.C. 527, 536–537; *Gallagher* v. *Penna. R.R. Co.*, 160 I.C.C. 563; *Consumers Material Corp.* v. *A., T. & S. Fe Ry. Co.*, 160 I.C.C. 579, 587.

or the fact that the shipper had to "absorb"[5] certain charges, is not enough to warrant an award, even though coupled with a showing of competition in common markets.[6] These matters are material to proof of damage, but the Commission has stressed the importance of the showing that preferred competitors controlled the market, or prices in the market.[7]

In addition to the *International Coal case, supra,* this Court's decision in *Keogh* v. *C. & N. W. Ry.,* 260 U.S. 156, affords judicial guide as to the show-

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[5] *Mercantile Lumber Co.* v. *I.C.R.R. Co.*, 59 I.C.C. 128, 129; *Empress Coal Co.* v. *O.-W. R.R. & N. Co.*, 69 I.C.C. 618; *Memphis Freight Bureau* v. *C. & E. I. Ry. Co.*, 101 I.C.C. 26, 27–28; *Stauffer Chemical Co.* v. *H. & B. V. Ry. Co.*, 142 I.C.C. 327, 328; *Badger Lumber & Coal Co.* v. *A., T. & S. Fe Ry. Co.*, 136 I.C.C. 350, 352; *Chattanooga Wheelbarrow Co.* v. *N. C. & St. L. Ry. Co.*, 132 I.C.C. 713, 714; *Home Packing & Ice Co* v. *Director General*, 57 I.C.C. 691, 697; *Donner Steel Co.* v. *D. L. & W. R.R. Co.*, 57 I.C.C. 745, 751; *Consumers Material Corp.* v. *A., T. & S. Fe Ry. Co.*, 160 I.C.C. 579, 588.

[6] *Hormel & Co.* v. *C.G.W.R.R. Co.*, 56 I.C.C. 419, 425; *Donner Steel Co.* v. *D. L. & W. R.R. Co.*, 92 I.C.C. 595, 599–600; *Iten Biscuit Co.* v. *C. B. & Q. R.R. Co.*, 53 I.C.C. 729, 731; *Stauffer Chemical Co.* v. *H. & B. V. Ry. Co.*, 142 I.C.C. 327, 328; *United Iron Works* v. *Director General*, 104 I.C.C. 449, 451.

[7] *Hylton Flour Mills, Inc.* v. *L. A. & S. L. R. Co.*, 152 I.C.C. 81, 83–84; *Hormel & Co.* v. *C.G.W.R.R. Co.*, 56 I.C.C. 419, 425; *Wharton Steel Co.* v. *Director General*, 59 I.C.C. 11, 23–24; *Mercantile Lumber Co.* v. *I.C.R.R. Co.*, 59 I.C.C. 128, 129; *Koenig Co.* v. *B. & O. R.R. Co.*, 81 I.C.C. 683, 684; *United Iron Wks.* v. *D.G.*, 104 I.C.C. 449, 451; *Chattanooga Wheelbarrow Co.* v. *N. C. & St. L. Ry. Co.*, 132 I.C.C. 713, 714.

ing necessary to establish damage in a discrimination case. Said case involved damages sought under the Sherman Anti-Trust Act, but the opinion recognized that the proof required was the same as under Section 8 of the Interstate Commerce Act. At pages 164–165 it was said:

> Under Section 7 of the Anti-Trust Act, as under Section 8 of the Act to Regulate Commerce, *Pennsylvania R.R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. * * *

In a footnote to the above decision the case of *Central Coal & Coke Co.* v. *Hartman* (Circ. Ct. Appeals, 8th Circ.), 111 Fed. 96, is referred to with approval. The latter decision reads at page 98:

> * * * For this reason the sufficiency of the evidence of damages to sustain the verdict will first be considered. The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be

> secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered.

It is true that "there is a clear distinction between the measure of proof necessary to establish the fact" of some damage and "the measure of proof necessary to enable" the fixing of the amount. *Story Parchment Co.* v. *Patterson Co.,* 282 U.S. 555, 562. But the fact of damage must be established as a "certain result of the wrong" and, as to the amount, it would seem that in no case may damages be determined by mere speculation or guess, although "where the tort itself is of such a nature as to preclude the ascertainment of the amount with certainty" it is "enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate" (idem, pages 562, 563).

The above decisions of this Court, particularly when considered in light of the complicated facts existing in discrimination cases, show that the fact of damage and its amount necessarily depend upon the facts and circumstances of each case. The decision of the lower court in the instant case discusses *Buffalo Union Furnace Co.* v. *L. S. & M. S. Ry.,* 44 I.C.C. 267, wherein reparation was awarded upon findings which it regarded as sufficiently like those here involved as to render the issuing of an award in this case the specific duty of the Commission. There are other cases[8] wherein reparation was also granted upon findings in some particulars like the *Buffalo case.* And, as above shown, there are still other cases wherein the facts found have been in some particulars the same and reparation has been denied. But examination of the facts of those cases, even as shown by the statements thereof contained in the Commission's reports, will disclose in each case different circumstances and conditions upon which the fact of damage might depend and, therefore, requiring a particular exercise of judgment and discretion. In *Donner Steel Co.* v. *Int. Com. Comm.* (Ct. of Appeals, D.C.) 285 Fed. 955 (Certiorari denied, 270 U.S. 651), it was said at pages 958, 959:

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[8] *Buffalo Brick Co.* v. *N.W.Ry. Co.*, 129 I.C.C. 294, 295; *Badger Lbr. & Coal Co.* v. *A., T. & S. Fe Ry. Co.*, 148 I.C.C. 173, 174; *Foster Lbr. Co.* v. *V. & S. R.R. Co.*, 112 I.C.C. 651, 653–654; *Lester & Toner* v. *L.I.R.R. Co.*, 83 I.C.C. 251, 252–253.

Appellant is here attempting to require the Interstate Commerce Commission to set aside its judgment and award damages upon the facts adduced. It is not contended that the Commission was without jurisdiction to hear the complaint and make the order complained of, or that its ruling is expressly inhibited by statute; but it is urged that the Commission after finding discrimination, committed an error of law in refusing to award damages to appellant. However inequitable and inconsistent the ruling, it cannot be corrected in this proceeding. It is too well settled to require discussion that the writ of mandamus cannot be converted into a writ of error, for the purpose of reviewing errors of law committed by a tribunal whose jurisdiction to make the order of judgment complained of is conceded. *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522, 18 L.Ed. 335. Nor can the writ be had to compel a particular exercise of judgment or discretion. *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 23 Sup. Ct. 698, 47 L.Ed. 1074; *Hall* v. *Payne,* 254 U.S. 343, 41 Sup. Ct. 131, 65 L.Ed. 295; *Interstate Commerce Commission* v. *United States ex rel. Members of Waste Merchants' Association,* 43 Sup. Ct. 6, 67 L.Ed.—(present term) (Id. 959–959).

(2) Mandamus cannot be used as a writ of error

It has been shown that the Commission, in determining that respondent was not entitled to an award of damage, exercised a power discretionary

in character, and that mandamus, as granted by the lower court, would compel the Commission to award reparation contrary to its judgment and discretion. And that, too, without the record upon which the Commission reached its determination, or any other record, before said court. The basis upon which the court held that mandamus would lie was that the Commission's express finding that the record would not support an award of damage was in conflict with other findings and statements in its report, which latter in the court's view rendered its writ "one to require the Commission to perform a specific duty imposed by the Act." The Court held that the Commission had found the fact of damage and the amount of the loss in face of the Commission's express finding that no damage was shown, which latter the court termed a conclusion contrary to earlier facts stated by the Commission. It is inescapable that the court's action compels a particular exercise of discretion contrary to the Commission's judgment. Furthermore, the Commission has applied the principles laid down by this court as to the requisite proof to show damage, and if in any way it gave erroneous effect to said principles mandamus is not a proper remedy to correct the error.

In *Interstate Commerce Commission* v. *Waste Merchants' Association,* 260 U.S. 32, this court held that mandamus would not lie to compel the Commission to set aside its decision denying reparation

to certain shippers by certain carriers because of loading services which, it was claimed, the carrier failed to perform under its tariffs, and which the shippers were thus obliged to perform. In disposing of the case the court said, at page 34:

> We have no occasion to consider the merits of the controversy before the commission. That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. It found that the rates charged were not unreasonable or discriminatory in violation of the commerce act, nor unreasonable for the service actually performed, in violation of the Federal control act. It found that the conditions complained of were an incident of the World War; that the arrangement for loading was a voluntary one beneficial to complainants' members; that there was no provision in the tariffs for allowance to shippers who load cars; and that, therefore, such allowance could not legally be made by the carriers. The commission dismissed the complaint because it held that the petitioners were not entitled to relief. *Waste Merchants' Association* v. *Director General,* 57 I.C.C. 686.
>
> Petitioners sought in the proceeding to set aside the adverse decision of the commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion, *River-*

side Oil Co. v. *Hitchcock,* 190 U.S. 316; *Ness* v. *Fisher,* 223 U.S. 683; *Hall* v. *Payne,* 254 U.S. 343; or be used as a writ of error, *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522. The case at bar is not like *Interstate Commerce Commission* v. *Humboldt S.S. Co.,* 224 U.S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U.S. 638, where the commission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U.S. 178, where the commission wrongly refused to perform a specific peremptory duty prescribed by Congress (Id. 34–35).

For the reasons above set forth, we respectfully insist that the decision of the Court of Appeals in this case should be reversed, that of the Supreme Court of the District of Columbia reinstated, and the petition for writ of mandamus dismissed.

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For Interstate Commerce Commission,
petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 748

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, J. R. CAMPBELL, C. W. AMSLER AND HENRY AMSLER, TRADING AS THE BIRCH VALLEY LUMBER COMPANY, A PARTNERSHIP, *Respondents,*

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Statement of the Case.

The statement of the case in the petition (except as to certain details hereinafter referred to), and the opinion of the court below (R. 53-59) adequately present the facts involved in this case.

However it should be noted that the reasonableness of the rate attacked was not in issue before the Interstate

Commerce Commission (hereinafter referred to as the Commission). While the complaint filed with the Commission alleged that the rate was unreasonable, in violation of Section 1 of the Interstate Commerce Act, upon the hearing complainant's evidence was confined to the support of its allegations of undue prejudice to complainant and undue preference of complainant's competitors, in violation of Section 3 (1) of the Interstate Commerce Act and the resulting pecuniary loss to the complainant. This appears from the following extract from the Commission's report:

> "Complainant, however, does not question the reasonableness *per se* of the blanket or group rates from Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high." (R. 33)

The violation of Section 3 (1) of the Interstate Commerce Act in the exaction of unlawful charges by defendant carriers is established by the Commission's finding that the rates assailed "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va." (R. 36)

The injury and the amount of the damage to the complainant, resulting from such violation of law, are established by the Commission's findings set out in its report, that (1) complainant was charged $15 per car for the transportation of its lumber from the mill to the junction point, in addition to the group rate from the junction

point, Allingdale, (R. 30); (2) the charge of $15 per car for the haul from the mill to the junction point was prepaid by the complainant, (R. 30); (3) complainant's selling prices of its lumber were quoted f. o. b. Allingdale, (R. 29); (4) complainant's lumber was sold in competition with that produced in the same general territory, (R. 30); and (5) complainant's competition was mainly with mills in the same general territory which were afforded the junction point (Allingdale) group rates, and complainant was forced to base its selling prices on the group (Allingdale) rates and *absorb* $15 per car. (R. 35-36).

Notwithstanding the above-described findings of unlawfulness of the charges of defendant carriers and resulting damage to the complainant, the Commission refused to enter an award of reparation, basing its refusal on the conclusion that, "The record will not support an award of reparation based on the undue prejudice found to exist." (R. 36)

The court below decided that "In this case appellant has shown, and the Commission has found, the violation of law complained of and likewise that appellant had sustained an injury and pecuniary loss by reason of the injury, to the extent of $15 for each car of lumber shipped within the statutory period," (R. 55-56) and said with reference to the refusal of the Commission to award reparation, "Hence it follows that the determination of the Commission that reparation should not be awarded is a mere conclusion contrary to its own findings of fact, and therefore contrary to the provisions of the Act." (R. 58)

Statutes Involved.

The rights of the respondents are determined by Sections 3 (1) and 8 of the Interstate Commerce Act (U. S. C. A., Title 49). Section 3 (1) prohibits any undue or unreasonable preference of, or any undue or unreasonable prejudice to, any shipper. Section 8 provides that every common carrier shall be liable for any violation of the act to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

The remedies by which the respondents may secure those rights are determined by Sections 9, 13 (1), and 16 (1) of the Interstate Commerce Act (U. S. C. A., Title 49). Section 9 provides that any person damaged may elect to recover therefor either before the Commission or in the Federal Courts. Section 13 (1) provides for the prosecution before the Commission of any complaint made by a shipper against a carrier subject to the Act. Section 16 (1) directs the Commission to enter an order for an award of reparation upon the determination by the Commission that the shipper has been damaged as a result of the carrier's violation of the statute.

The text of the Sections above referred to is found in the Appendix to this brief.

Question Presented.

On page 2 of the petition for certiorari the question presented for the consideration of this Court is stated by petitioner in the following form:

> "Whether the writ of mandamus will lie to compel the Interstate Commerce Commission, in a proceeding in which it has taken jurisdiction and exer-

> cised the authority duly conferred upon it by statute, to make an award of reparation in favor of a complainant, where the Commission finds that such complainant has been subjected to the exaction of charges which are unduly prejudicial as to it, and concerning which charges the Commission further finds that 'the record will not support an award of reparation based on the undue prejudice found to exist'."

We submit that the above statement of the question presented is thoroughly inaccurate and misleading for the reason that it omits entirely the findings made by the Commission with respect to the damages resulting from the violation of law by defendant carriers.

Adopting the language of the petitioner so far as possible, we submit that the question presented for the determination of the Court is:

Whether the writ of mandamus will lie to compel the Interstate Commerce Commission, in a proceeding in which it has taken jurisdiction and exercised the authority duly conferred upon it by statute, to make an award of reparation in favor of a complainant, where the Commission finds that such complainant has been subjected to the exaction of unlawful charges which were unduly prejudicial as to it, and concerning which charges the Commission further finds (1) *that the rate exacted was unlawful to the extent of $15 per car during the past statutory period;* (2) *that the complainant was in competition with other mills in the same general territory;* (3) *that the competing mills enjoyed a rate $15 per car less than the complainant;* (4) *that complainant prepaid the unlawful charge of $15 per car to the junction point, and quoted its prices f. o. b. the junction point;* and (5) *that complainant was forced to base its prices on the group rate accorded its competitors and absorb the $15*

unlawful charge; but nevertheless refuses to award reparation, and bases its refusal on the conclusion that "the record will not support an award of reparation based on the undue prejudice found to exist."

Summary of Argument.

The argument in the brief of the petitioner is devoted to two propositions, namely, (1) that this case involves a question of general importance, and (2) that the decision of the Court of Appeals is in conflict with prior decisions of that Court and inconsistent with decisions of this Court.

It may be conceded that the protection of shippers' rights from violations of the Interstate Commerce Act by the carriers is a matter of great importance to the public. While it is true that the question of railway regulation and protection of shippers generally is of great importance, it must be borne in mind that in the case at bar the Commission's administrative determination in fixing the standard of rates, both for the past and for the future, is not questioned, as the carriers obeyed the order of the Commission by reducing the rates $15 per car for the future. The sole controversy concerns the award of reparation to the particular shipper complainant for the damages suffered by it as a result of the carriers' exaction of charges which, by the unquestioned administrative standard prescribed by the Commission, were unlawful. The controversy is therefore resolved into one between private litigants over past transactions, with which the public has no concern.

By repeated pronouncements of this court it is well established that the writ of mandamus will not issue to compel the exercise of discretion in a particular manner or to reach a given result. But that principle is not involved in the case at bar for the reason that the Com-

mission has completely exercised its discretion, or quasi judicial function, in making the findings of damage which entitle complainant (respondents) to an award of reparation.

In the light of the facts in this case the questions for consideration are, (1) whether the Commission's conclusion that it will not award reparation overcomes and negatives its direct and positive findings of damage resulting from the carriers' unlawful acts, and, (2) whether the writ of mandamus is a remedy proper to secure the performance by the Commission of its statutory duty to enter an award of reparation when, after a full hearing, it finds the shipper has been damaged in a specified amount by the carriers' violation of law.

ARGUMENT.

I.

The Findings of Fact Made by the Commission Determined Complainant's Right to Recover, and that Right of Recovery was neither Destroyed nor Affected by any Conclusion Contrary Thereto.

It is well established that to recover damages the shipper must show that the violation of law by the carrier has resulted in an injury to the shipper, and that the measure of damage for such injury is the pecuniary loss sustained by the shipper. *Parsons* v. *Chi. & N. W. Ry. Co.*, 167 U. S. 447; *Pennsylvania R. R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184; *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473. Both petitioner and respondents are in harmony on this proposition, and were it not for the fact that a considerable portion of petition-

er's brief is devoted to argument based upon a mistaken conception of the theory of the Court of Appeals no discussion of this point would be necessary.

On pages 8 and 9 of petitioner's brief it is stated that,

> "The theory of the Court of Appeals appears to be that, after the Commission had found that the Lumber Company had been unduly prejudiced by the payment of charges from Tioga higher than were collected on like traffic from the Allingdale group, the complainant was entitled as a matter of law and regardless of whether it had been damaged in the premises, to an award of reparation measured by the amount that the Tioga rates exceeded the contemporaneously applicable Allingdale group rates."

Several pages of petitioner's brief are devoted to showing the error of the supposed theory by a lengthy discussion of the *International Coal Case,* supra.

Examination of the opinion of the Court of Appeals shows that it is not susceptible of the petitioner's interpretation that in the absence of proof of injury and the resulting pecuniary loss a shipper is entitled "as a matter of law, and regardless of whether it had been damaged in the premises" to an award of damages in the amount by which the unlawful rate exceeds that found to be lawful. On the contrary the opinion of the Court of Appeals states that the Commission found "that appellant had sustained an injury and pecuniary loss by reason of the injury to the extent of $15 for each car of lumber shipped within the statutory period." (R. 55-56)

The *International Coal Case,* supra, involved an attempt of a shipper to recover damages from the carrier for certain rebates given the shipper's competitors. This Court held that the amount of the rebates given a com-

petitor was not necessarily an adequate measure of damages to the shipper. However that case did lay down certain principles respecting recoverable damages which are directly applicable to the instant case. This Court therein said:

> "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because Sec. 8 expressly declares that wherever the carrier did an act prohibited, or failed to do any act required, it should be *'liable to the person . . . injured thereby for the full amount of damages sustained in consequence of any such violation . . . together with a reasonable . . . attorneys' fee'.*" (P. 203)

> "The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." (P. 204)

> ". . . the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be, and whether greater or less than the rate of rebate paid." (P. 206)

The violation of law by defendant carriers being established by the Commission's administrative determination, to determine the complainant's right to damages it is necessary only to examine the Commission's report to ascertain whether the Commission found that complainant had suffered a pecuniary loss as a result of defendant carriers' wrong. The findings of fact by the

Commission, however made, and wherever appearing in the report, must govern. *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412.

The Commission's report (R. 28-37) shows that the complainant was engaged in the lumber business at Tioga, W. Va., 7.1 miles from Allingdale, W. Va.; that it shipped its products to all parts of the U. S.; that complainant was forced to pay a charge of $15 per car for the transportation of its lumber to Allingdale; that in the same region or territory were many other lumber firms, competitors in the same business, producing similar products, and likewise shipping to competitive markets in all parts of the United States, and enjoying the Allingdale group rate. There was no difference of kind or quality between the products of the complainant and the products of its competitors. Since the markets were identical the marketing conditions for complainant and its competitors were the same.

The only difference between conditions under which complainant and its competitors did business, was that the complainant was required to pay a freight rate of $15 per car more than its competitors were required to pay.

The Commission's findings of fact are so positive and direct as to require no analysis or argument to demonstrate that they established the fact of injury and the amount of the damage. Every element of damage is set forth in the findings.

The fact of injury and the amount of resultant damage by reason of the unlawful charge of $15 per car for the haul over the rails of the S. C. & M. Ry. to the junction point, Allingdale, W. Va., are shown by the findings:

"On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction point." (R. 30) and

"Complainant's prices are all quoted f. o. b. Allingdale, W. Va." (R. 29) and

"The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory." (R. 30) and

"In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the junction-point or group rates apply from points on certain short line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant, and intervenor, are forced to base their prices on the group rates, and absorb the charges of the S. C. & M." (R. 35-36)

It may be noted further that the finding last quoted prevents any confusion as to the identity of the person injured by the unlawful act of the carriers, since it determines that the complainant was forced to and did absorb the unlawful charge.

That the complainant's profits would have been greater, or its losses less, in the amount of $15 per car, had the existing discrimination been removed, is established beyond argument by the Commission's findings of fact. That the complainant is damaged to the extent of $15 per car when it is forced to pay a freight rate $15 per car greater in amount than its competitors are forced to pay, is forced to base its prices on the freight rates accorded its competitors, and is forced to absorb the ex-

cessive charge of $15 per car, is so elementary as to require no demonstration.

It is suggested on page 16 of petitioner's brief that,

> "For aught that appears, respondent's operating and labor costs, as well as other costs incurred by it in producing its lumber, may be such that even with the additional $15 charge it had to pay the S. C. & M., it could still do business on even terms with its competitors."

We can suggest no more complete answer to this contention than that made by the Court of Appeals in its opinion, (R. 58);

> ". . . the only suggestion of justification for the Commission's refusal to make the award, and this was made in the argument, is that appellant in producing its lumber may have an advantage of operating and labor cost which its competitors do not have. We do not think this fact, even if it be true, would reduce appellant's recoverable damages under the statute. In such circumstances, in view of the finding of equality of price with its competitors, its profits would have been greater to the extent of its lower cost of production; but when, on the other hand, as appears from the findings of fact, it was required to reduce its profits $15 per car by the prejudicial rate it was forced to pay, the latter figure in the circumstances necessarily represents its damages, since obviously otherwise its profits would have been that much more."

The brief of the petitioner disregards the Commission's findings of fact and relies upon its conclusion that "the record will not support an award of reparation" to defeat respondents right to damages. But the findings of fact made by the Commission with respect to the dam-

age sustained by the shipper as the result of the defendant carriers' unlawful acts determine the right of the shipper to damages. And where there is a contradiction between the findings of fact made and the conclusion purporting to be based thereon the findings of fact must govern.

In *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, at page 91 it was said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. * * *
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' * * * or if the facts found do not, as a matter of law, support the order made (U. S. v. Baltimore & O. S. W. R. Co., 226 U. S. 14, ante 104, 33 Sup. Ct. Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 301, 45 L. ed. 201, 21 Sup. Ct. Rep. 115; Washington Ex. Rel. *Oregon R. (92) & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Muser v. Magone, 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77.)"

As pointed out by the Court of Appeals (R. 58),

> ". . . the determination of the Commission that reparation should not be awarded is a mere conclusion contrary to its own findings of fact and therefore contrary to the provisions of the act. In such a case the granting of the writ is not the control of a particular discretion or a substitution of the judgment of this court for that of the Commission, but a lawful order to the Commission to carry into effect the plain result of the exercise by it of its discretion—a situation in all respects analogous to an order to an inferior court to sign a judgment which it rendered but refused to sign."

When a shipper elects to prosecute his claim for damages before the Commission the Commission is required to exercise a quasi-judicial function and to determine the cause not only in accordance with the evidence submitted but in accordance with the law of damages. The duty of the Commission in this respect is well defined by the following language of this Court in *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 290, 61 L. ed. 305:

> "By Section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of the damages sustained in consequence' of the violation. (24 Stat. at L. 382, Chap. 104, Comp. Stat. 1913, Section 8572.) By Section 9 any person so injured may make complaint to the Commission or may sue in a Court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the

complainant the sum to which he is entitled is provided for by Section 16 * *. The decisions say that whatever the damages were, they could be recovered * * *."

It is clear that the findings of fact made by the Commission established damages to the complainant in a specified amount resulting directly and solely from the unlawful acts of the defendant carriers. Under the rules laid down by this Court in *Pennsylvania R. R. Co. v. International Coal Min. Co.*, supra, there can be no question that the Commission found every element of damage essential to a recovery. In the light of the findings made by the Commission its conclusion that the record would not support an award of reparation is nugatory.

II.

The Denial of Reparation by the Commission was Inconsistent with its Findings of Fact and Mandamus is a Remedy Proper to Obtain the Performance by the Commission of its Statutory Duty to Enter an Award of Reparation Consistent with its Findings.

One of the reasons relied upon by the petitioner for the granting of a writ of certiorari by this Court is that "the decision of the Court of Appeals of the District of Columbia is in conflict with prior decisions of that Court."

While the decision is in no way in conflict with prior decisions of that Court, we submit that in any event a decision in conflict with or overruling an earlier decision of the same Court is not one of the "special and important reasons" for the grant of the writ by this Court.

While the opinion of the Court of Appeals clearly dis-

tinguishes the case at bar from the case of *Donner Steel Co. v. Interstate Commerce Commission,* 285 Fed. 955, it may be pointed out that in that case, while the Commission found that there had been a violation of Section 3, it expressly found that the shipper had not proved its damages resulting from the violation of law. With respect thereto the Commission said in its report of that case, (*Donner Steel Co. v. D. L. & W. R. R. Co.,* 57 I. C. C. 745):

> "We are of opinion and find that the complainant has not shown that its profits would have been any greater had the existing discrimination and prejudice been removed, or that it has suffered any damage of which such discrimination and prejudice are the proximate cause." (P. 752)

Thereafter the complainant, Donner Steel Co., sought a writ of mandamus from the Supreme Court of the District of Columbia to compel the Commission to set aside its order and award damages upon the evidence introduced at the hearing before the Commission. Issuance of the writ was denied and the action of the lower Court was affirmed by the Court of Appeals of the District of Columbia, on the ground that the finding of the Commission that the appellant had not been damaged could not be disturbed. *Donner Steel Co. v. I. C. C.,* 285 Fed. 955.

Thereafter the Commission granted a petition of the Steel Company for a rehearing and a further hearing on the question of damage was held. Upon the rehearing, (*Donner Steel Co. v. D. L. & W. R. R. Co.,* 92 I. C. C. 595) the Commission affirmed its previous finding, saying at page 600:

> "Upon further consideration we affirm our original finding that complainant has not established the

fact that it has been damaged because of the undue prejudice the existence of which was found in our original report. Reparation is therefore denied."

It is obvious that the decision of the Court of Appeals in the *Donner Steel Case,* supra, is not in conflict with its decision in this case for the reason that it was there sought to compel the Commission by way of mandamus to do what the Commission already has done in its exercise of discretion in this case, namely, to find as a fact that the shipper was damaged by the unlawful acts of the carriers. We are in thorough accord with the statement on page 12 of the petitioner's brief that the question of damage presented to the Commission for determination is one of fact. It must follow that the findings of fact made by the Commission could not be altered through the agency of the writ of mandamus, as was sought in the *Donner Steel Case.*

The petitioner contends that the decision in the instant case is also in conflict with the decisions of the Court of Appeals in *Bartlesville Zinc Co. v. I. C. C.*, 30 F.(2d) 479, and *Interstate Commerce Commission v. U. S. ex rel. Capital Grain & Feed Co.*, 35 F.(2d) 1012. It is deemed sufficient to point out that in the former case the Court denied a writ of mandamus to the Commission which would have directed a particular exercise of judgment or discretion. The Commission had found, in the exercise of its discretion, (*Bartlesville Zinc Co. v. Director General,* 74 I. C. C. 26, 30) that:

"In our opinion the demurrage charges were assessed in substantial compliance with the provisions of the applicable tariffs.

"We therefore find that the demurrage charges attacked were legally applicable and were not unlawful."

In the *Capital Grain & Feed Co. Case,* supra, it was sought to control and direct the exercise of discretion and judgment of the Commission by requiring it to make a finding that the rates assailed had been unreasonable or unduly prejudicial in the past. Such an attempt to interfere with the purely administrative function of the Commission must necessarily fail.

Interstate Commerce Commission v. Waste Merchants Asso., 260 U. S. 32, cited and quoted at length on pages 12 and 13 of petitioner's brief can have no application to this case because mandamus was denied for the sole reason that its issue would have compelled a particular exercise of discretion in setting aside the Commission's finding that the rates were not unlawful. Mr. Justice Brandeis stated at page 36:

> "It (the Commission) heard the case fully. It found that the rates charged were not unreasonable or discriminatory, in violation of the Commerce Act, nor unreasonable for the service actually performed, in violation of the Federal Control Act."

It is apparent that none of the decisions of this Court, or of the Court of Appeals of the District of Columbia cited by the petitioner, are in conflict with the decision of the Court of Appeals in the case at bar, for the reason that all the cases cited attempt, either to set aside administrative standards prescribed by the Commission, or to compel the Commission to make particular findings of fact in its quasi-judicial capacity. Far from seeking to set aside administrative standards prescribed by the Commission, or the findings of the Commission made in its quasi-judicial capacity, the respondents right to recover is grounded upon the administrative standard *and* findings as made by the Commission.

Conclusion.

The facts established by the Commission's findings, set out in its report, are:

1. That the rates exacted of complainant and accorded to its competitors, were unduly prejudicial to complainant and unduly preferential of its competitors to the extent of $15 per car, and therefore unlawful as violative of Section 3 (1) of the Interstate Commerce Act.

2. That by reason of the unlawful rates complainant was compelled to quote its prices f. o. b. Allingdale and was required to pay, and did prepay, a charge of $15 per car for the transportation of its lumber from its mills to Allingdale.

3. That the lumber was sold in competition with other lumber produced in the same general territory and enjoying the unduly preferential interstate through rates $15 per car less than complainant's lumber, and

4. That complainant was forced to base its selling price on the group rates accorded its competitors and absorb the unlawful charges of $15 per car to the junction point, Allingdale, W. Va.

Upon the fact of these findings of damage and the amount of the pecuniary loss per car, the Commission had no choice in awarding reparation, but had the positive and mandatory duty imposed by the mandatory provision of Section 16 of the Interstate Commerce Act to enter an order awarding reparation. Its conclusion that "the record will not support an award of reparation" is clearly in conflict with its findings of fact, is arbitrary, and without legal effect.

The order denying reparation being a negative order, mandamus is the only remedy available to the injured shipper. Mandamus will lie to compel the Commission to do that which it was obliged to do upon its own findings of damage, namely: to enter an order of reparation in favor of respondents.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Attorneys for Respondents.

March 3, 1933.

APPENDIX

Applicable Sections of the Interstate Commerce Act

Section 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

U. S. C. A., Title 49.

Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

U. S. C. A., Title 49.

Section 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, or any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to

pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *.

U. S. C. A., Title 49.

Section 13 (1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

U. S. C. A., Title 49.

Section 16 (1). That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

U. S. C. A., Title 49.

FILE COPY

APR 15
CHARLES ELM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 748

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, J. R. CAMPBELL, C. W. AMSLER, AND HENRY AMSLER, TRADING AS THE BIRCH VALLEY LUMBER COMPANY, A PARTNERSHIP,
Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia

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BRIEF OF RESPONDENTS.

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April 15, 1933.

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On Writ of Certiorari to the Court of Appeals of the District of Columbia

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BRIEF OF RESPONDENTS.

OPINIONS.

Respondents' right to the writ of mandamus directed to the Interstate Commerce Commission is determined by the Commission's report entitled *Birch Valley Lumber Company v. Strouds Creek & Muddlety Railroad Company, et al,* 144 I. C. C. 419, which accompanies the

respondents' petition as Exhibit F, set out in full on pages 28-37 of the record.

The memorandum opinion of the Supreme Court of the District of Columbia overruling the demurrer to the answer of the Commission appears on page 50 of the record.

The opinion of the Court of Appeals of the District of Columbia reversing the Supreme Court has not been published but appears on pages 53-59 of the record.

STATEMENT.

The statement of the case in petitioner's brief (except as to certain details hereinafter referred to) adequately presents the facts involved in the proceedings before the Commission and in the courts below.

However the interpretation placed upon the opinion of the Court of Appeals by the petitioner is not warranted by the opinion itself. On page 17 of the petitioner's brief it is said with respect to that opinion:

> "The accompanying opinion held in substance that there was inconsistency between the Commission's findings of fact and its *conclusion that respondent had not been damaged* as a result of violations of the Interstate Commerce Act committed by the railroads, and as no other remedy was available, mandamus would lie to compel the Commission to make the award. (R. 53-59)" (Italics ours.)

The Commission *did not find or conclude* that respondents had not been damaged. Its conclusion that "the record will not support an award of reparation" did not purport to be based on a finding that respondent had not been damaged. That the Court of Appeals clearly had in mind the Commission's findings of recoverable dam-

age is shown by its statement "In this case the Commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss." (R. 58.)

It may be noted also that the reasonableness of the rate attacked was not in issue before the Commission. While the complaint filed with the Commission alleged that the rate was unreasonable, in violation of Section 1 of the Interstate Commerce Act, upon the hearing complainant's evidence went to the support of its allegations of undue prejudice to complainant and undue preference of complainant's competitors, in violation of Section 3 (1) of the Interstate Commerce Act and the resulting pecuniary loss to the complainant. This appears from the following extract from the Commission's report:

> "Complainant, however, does not question the reasonableness *per se* of the blanket or group rates from Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high." (R. 33.)

The findings made by the Commission with respect to the violation of law by the defendant carriers and the resulting damage to the shipper may be summarized in the following quotations from its report.

The violation of Section 3 (1) of the Interstate Commerce Act in the exaction of unlawful charges by defendant carriers is est blished by the Commission's finding that the rates assailed "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general ori-

gin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va." (R. 36.) Allingdale is the junction point.

The injury and the amount of the damage to the complainant, resulting from such violation of law, are established by the Commission's findings set out in its report, that:

> "On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction point." (R. 30.)
>
> "The charge of the S. C. & M. is prepaid by the shippers." (R. 30),
>
> "Complainant's prices are all quoted f. o. b. Allingdale, W. Va." (R. 29),
>
> "The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory." (R. 30), and
>
> "In the present case complainant's competition is mainly with the mills in the same general territory, which includes the other groups where the junction-point or group rates apply from points on certain short line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant, and intervenor, are forced to base their prices on the group rates, and absorb the charges of the S. C. & M." (R. 35-36.)

It may be noted further that the finding last quoted prevents any confusion as to the identity of the person injured by the unlawful acts of the carriers, since it de-

termines that the complainant was forced to and did absorb the unlawful charge.

For reasons peculiar to practice and procedure before the Commission, the complainant was not required at the hearing upon the complaint to show the total number of cars which had moved at the rate complained of. It appeared, incidentally, from the evidence as shown by the Commission's report, that during one six-month period a total of 565 cars moved from points on the S. C. & M. to various destinations. Where a complainant before the Commission shows a right to an award of reparation, it is the practice (if there is a dispute as to the amount of damage) to determine the amount of damage suffered by complainant, and the reparation to which he is entitled, in a supplemental proceeding. This is sanctioned by the Commission under its Rule V, quoted in full in Paragraph XI of the petition. (R. 4, 5.) This rule finds its inception in the policy of the Commission to avoid encumbering the record with a mass of detail which would serve no purpose if reparation be denied, and explains the absence from the Commission's report of the number of cars upon which the unlawful charge of $15 had been paid.

STATUTES INVOLVED.

The rights of the respondents are determined by Sections 3 (1) and 8 of the Interstate Commerce Act (U. S. C. A. Title 49). Section 3 (1) prohibits any undue or unreasonable preference of, or any undue or unreasonable prejudice to, any shipper. Section 8 provides that every common carrier shall be liable for any violation of the act to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

The remedies by which the respondents may secure those rights are determined by Sections 9, 13 (1) and 16 (1) of the Interstate Commerce Act (U. S. C. A., Title 49). Section 9 provides that any person damaged may elect to recover therefor either before the Commission or in the Federal Courts. Section 13 (1) provides for the prosecution before the Commission of any complaint made by a shipper against a carrier subject to the Act. Section 16 (1) directs the Commission to enter an order for an award of reparation upon the determination by the Commission that the shipper has been damaged as a result of the carrier's violation of the statute.

By the provisions of Section 14 (1) (U. S. C. A., Title 49) the Commission is required to make a written report in which it shall state its conclusions, decision, order, and findings of fact on which an award of damages is made.

The text of the Sections above referred to is found in the Appendix to this brief.

QUESTION PRESENTED.

On page 3 of petitioner's brief it is stated that "The ultimate question here raised is whether the Court of Appeals of the District of Columbia did not err in concluding that mandamus would lie to compel the Commission to reach a different judgment and issue an award of damages."

Respondents do not seek to compel the Commission to reach a "different judgment". Respondents do seek to compel the Commission to *enter an order making effective* its judgment and discretion *already exercised*, to wit, its determination that as a result of defendant carriers' unlawful acts and practices respondents have suffered

injury and resultant damage in a definite and specified amount.

We submit that the questions presented are (1) whether the findings of fact made by the Commission established respondents' right to recover damages, and if so, (2) whether mandamus is a remedy proper to secure an order of reparation for the damages sustained.

SUMMARY OF ARGUMENT.

The record made on hearing before the Commission is not before this Court. Therefore the rights of respondents are to be determined upon the findings of the Commission set out in its report. (R. 28-37.)

There is no question involving the administrative action of the Commission. In the exercise of its administrative function the Commission held the assailed rates unlawful for the *past*, present, and future. The defendant carriers complied with the order of the Commission to cease and desist from practicing the undue prejudice and preference found to exist, and to maintain and apply regulations and practices which would prevent and avoid said undue prejudice and preference. (Order, R. 41.). That order became effective on January 14, 1929 (R. 8), and has remained effective since.

After making the administrative determination that the assailed rates were unlawful for the past, the Commission in the exercise of its quasi-judicial function proceeded to consider the question of damage to respondents caused by the exaction and collection of the unlawful charges by defendant carriers during the statutory period. Upon that consideration the Commission made certain findings of damage which respondents contend entitle them to an award of reparation.

Therefore this brief will be devoted to a discussion of the propositions that:

1. The findings of the Commission determine and establish injury to the respondents resulting from the violations of law by defendant carriers, the amount of resulting damage sustained, and the right of respondents to an award of reparation for the damages so found.

2. The writ of mandamus is the remedy proper to secure the performance by the Commission of its statutory duty to enter an award of reparation for the amount of damages found to have been sustained.

ARGUMENT.

I.

The Findings of the Commission Determine and Establish Injury to the Respondents Resulting from the Violations of Law by Defendant Carriers, the Amount of Resulting Damage Sustained, and the Right of Respondents to an Award of Reparation for the Damages so Found.

Before proceeding to a discussion of the question presented for this Court's determination we desire to eliminate any controversy regarding certain well settled propositions of law argued at length in petitioner's brief.

To recover damages for a violation of the Interstate Commerce Act a shipper must show the violation of law by the carrier, and that such violation has resulted in an injury to the shipper. The measure of damages for such injury is the pecuniary loss sustained by the shipper as a result of the carriers' wrongful acts. *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447; *Penna. R. R. Co. v. International Coal Min. Co.*, 230 U. S. 184; *Mills v.*

Lehigh Valley R. R. Co., 238 U. S. 473. At no stage of this proceeding have respondents maintained that recovery can be had without proof of damage. We do contend, as the court below held, that the respondents (complainant before the Commission) proved damages in the amount of $15 per car for each and every car shipped for which the unlawful rate was paid by the complainant. The findings made by the Commission in its report conclusively establish the loss of the shipper complainant and the liability of the defendant carriers.

On pages 24 and 25 of petitioner's brief the holding of the Court of Appeals that the Commission's report showed that it had found as a fact that complainant was damaged in the amount of $15 per car, is imputed to a supposed view that "the Court may have considered that the finding of the fact of damage was comprehended in the Commission's finding of undue prejudice, which it sets out in quotations, namely the finding that the rates 'were, are, and for the future will be, unduly prejudicial to complainant'." With respect to the view of the court below it is further stated on page 25 of petitioner's brief that "2. The Court's statement that the Commission had found 'the amount of loss' is plainly based on the fact that the rates were found to be unduly prejudicial to the extent that they exceeded the rates from the group which includes Allingdale, namely, the sum of $15, charged by the S. C. & M. to Allingdale, which constituted the difference between the rates paid by respondent and the rates of those of its competitors in the Allingdale group."

There is nothing in the opinion of the Court of Appeals which warrants the interpretations quoted above. The contrary is shown by its distinction (R. 57) between the instant case and the case of *Donner Steel Co. v. I. C. C.*,

285 Fed. 955, a decision of the same court. In the *Donner Steel case* the Commission had found that the practice complained of had been unduly prejudicial to complainant in violation of Section 3, but that complainant had not shown resulting damage. *Donner Steel v. D. L. & W. R. R.*, 57 I. C. C. 745. In its opinion (R. 57) the Court below said, with respect to its previous decision in the *Donner Steel case:*

> "Our conclusion in refusing to order the writ to issue was based on the ground that the Commission had definitely and unmistakably decided from the evidence before it that the shipper *had not been damaged,* * * *" (Italics ours).

Moreover it appears affirmatively from the opinion of the Court below that its decision, that the Commission had found as a fact that complainant had established recoverable damage, was based upon definite and specific findings of fact set out in the Commission's report. For example the Court said:

> "The commission found that appellant's competitors, having their mills within the Allingdale group and located on branch lines of the B. & O., paid only the Allingdale rate, which was $15 per car less than the charges exacted of appellant for the service from its mills to the same destinations. The result of this was that appellant was required to pay $15 more for each car of lumber shipped than its competitors. The commission likewise found that appellant's *prices were all quoted f. o. b. Allingdale;* that it sold its lumber in *competition with that produced in the same general territory,* and was *forced to base its price on the group rates* and *to absorb the $15 per car charge* of the Strouds Creek road." (R. 54) (Italics ours.)

"From what we have already said, it is obvious that in this case appellant has shown, and the commission has found, the violation of law complained of, and likewise that appellant has sustained an injury and pecuniary loss by reason of the injury to the extent of $15 for each car of lumber shipped within the statutory period." (R. 55-56.) and

"In this case the commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss. In these circumstances nothing more is necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car. If there is any other element entering into the computation of damages which might change this result, there is nothing in the commission's findings of fact to indicate it." (R. 58.)

The above quoted extracts from the opinion of the Court of Appeals summarize the findings made by the Commission in the exercise of its "judgment and discretion", both as to the prescription of the administrative standard of the rates involved, and as to the judicial inquiry into the question of the rights of the shipper dependent upon "whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate." *Great Northern Rwy. Co. v. Merchants Elevator Co.*, 259 U. S. 285.

Respondents rest their case and their right to recovery upon the determination so made by the Commission of the issues of fact presented for its decision. The right of respondents to an award of reparation is determined by the law of damages, not by the whim of the Commission. Certain principles directly applicable to this case were laid down by this Court in *Pennsylvania R. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, where it was said:

"The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because Sec. 8 expressly declares that wherever the carrier did an act prohibited, or failed to do any act required, it should be '*liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation * * * together with a reasonable * * * attorneys' fee*'." (P. 203).

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." (P. 204).

"* * * the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be, and whether greater or less than the rate of rebate paid." (P. 206).

When a shipper elects to prosecute his claim for damages before the Commission he submits his cause for determination in accordance with the evidence submitted and the law of damages applicable thereto. In deciding the cause the Commission exercises a quasi-judicial function, and the rule of damages to be applied is defined by the following language used by this Court in *Louisville & N. R. R. Co., v. Ohio Valley Tie Co.*, 242 U. S. 288, 290:

"By Section 8 a common carrier violating the commands of the act is made liable to the person injured

thereby 'for the full amount of the damages sustained in consequence' of the violation. (24 Stat. at L. 382, Chap. 104, Comp. Stat. 1913, Section 8572.) By Section 9 any person so injured may make complaint to the Commission or may sue in a Court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by Section 16 * *. The decisions say that whatever the damages were, they could be recovered * * *."

There are six distinct findings in the report of the Commission establishing the fact and the amount of damages. The finding last quoted that "there appears to be no question that complainant, and intervener, are forced to base their prices on the group rates, and absorb the charges of the S. C. & M." (R. 35-36), is alone sufficient to establish respondents' (complainant's) right to recover. The Commission itself has followed and applied this rule. In *Buffalo Union Furnace Co. v. L. S. & M. S. Ry. Co.*, 44 I. C. C. 267, reparation was awarded for charges which the Commission held unduly prejudicial to the complainant and which charges it "was compelled to absorb".

The principles governing the award in that case, and equally applicable in this case, are set forth at page 270 of the report where it was said:

> "In the instant case no rebate is involved; the pleadings sufficiently allege damages arising out of the unlawful discrimination which we have found to exist; and there is sufficient evidence to prove that the wrong of the carrier has in fact operated to complainants' injury.

"The furnace company was in competition with the Lackawanna Steel Company, the Cleveland Furnace Company, and many other iron manufacturers located in western Pennsylvania and eastern Ohio. There was competition between these manufacturers in the purchase of coal, coke, limestone, iron ore, and various other materials. Other furnaces in the Buffalo-Black Rock switching district received their raw materials at the same line-haul rate, and the cars consigned to certain of these furnaces were spotted by the trunk lines or allowances for spotting were made to the industrial roads. The transportation charges paid by the furnace company were higher than those paid by its competitors for a service substantially similar in all respects. Complainant furnace company and these competing furnaces were engaged in manufacturing the same kinds of iron, which were sold in the same competitive markets. 21 I. C. C. 625. It was forced to meet and did meet the prices at which its competitors sold. Under such circumstances it was impossible to add the cost of performing the terminal switching to the selling price of such products. In consequence complainant was compelled to *absorb that cost* out of its profits. It *inevitably follows* that the complainant furnace company suffered a loss in profits measured by the cost of that interchange switching service, and we find that it *was damaged to the extent of such cost.*" (Italics ours.)

With respect to the case of *Swift Lumber Co. v. Fernwood & Gulf R. R. Co.*, 61 I. C. C., discussed in petitioner's brief, it seems sufficient to refer to the report of the Commission in this case wherein it pointed out both the features of similarity and of distinction between that and the instant case. While undue prejudice in that case was found to exist, reparation was denied.

"The Swift Lumber Company's competition in that case was not shown to be with any particular mills and was not confined to those in the blanket territory." (R. 35.)

The report of the Commission in the *Swift Lumber case* further indicates that reparation would have been awarded upon shipments made to markets in competition with other producers in the blanket territory had the complainant shown that it paid and bore the freight charges. At page 491 it was said:

"Complainant has shown that it made shipments to points in Tennessee upon which rates made by combination upon Fernwood were applied, but has failed to show that it paid and bore the freight charges thereon. Reparation is accordingly denied."

That the respondents here did pay the unlawful freight charge of $15 per car is, of course, established by the Commission's express finding that "the charge of the S. C. & M. is prepaid by the shipper." (R. 30). That respondents bore the unlawful charges is shown by the finding of the Commission, "but there appears to be no question that complainant and intervener are forced to base their prices on the group rate and absorb the charges of the S. C. & M." (R. 35-36).

In none of the cases cited by petitioner has the Commission failed to award reparation to the injured shipper where it was shown that the shipper paid and bore the unlawful charge, that his competitors did not pay the unlawful charge, that he was forced to *base his selling price on,* and *was compelled to absorb,* the unlawful charge.

Under the rule laid down by the Supreme Court in *Penna. R. R. Co. v. International Coal Min. Co.*, 230 U. S.

184, there can be no question that the Commission found every element of damages essential to a recovery. The Commission not only made a direct finding of unlawfulness of the rate in the past, but also found that the shipper was injured and damaged thereby in the amount of $15 for each car for which the shipper was charged the unlawful rate.

II.

The Writ of Mandamus is the Remedy Proper to Secure the Performance by the Commission of its Statutory Duty to Enter an Award of Reparation for the Amount of Damages Found to Have Been Sustained.

It should be stated at the outset that respondents recognize that mandamus will not issue to compel a "particular exercise of judgment or discretion." But the Commission had fully and completely exercised its judgment and discretion in making the determinations set out in its report.

After making those findings of violation of law by defendant carriers and resulting damage to the shipper, the Commission concluded its report with the brief statement that

> "The record will not support an award of reparation based on the undue prejudice found to exist." (R. 36.)

Viewing the quoted conclusion in the light most favorable to the contention of the Commission, it represents nothing more than the Commission's conception of the duty imposed upon it by the statute. Respondents concede, moreover they insist, that findings of fact by the

Commission are final in their nature and must stand undisturbed as made. But a mistaken or contradictory conclusion will be corrected by the Court. A judgment cannot stand when based on conclusions of law which are at variance with the findings of fact. Neither can a judgment stand when based on purported findings of fact which are in effect mere legal conclusions.

The conclusion made in direct contradiction to the express findings is a nullity. As stated by the Court below (R. 38):

> "Hence it follows that the determination of the commission that reparation should not be awarded is a mere conclusion contrary to its own findings of fact and therefore contrary to the provisions of the act. In such a case the granting of the writ is not the control of a particular discretion or a substitution of the judgment of this court for that of the commission but a lawful order to the commission to carry into effect the plain result of the exercise by it of its discretion—a situation in all respects analogous to an order to an inferior court to sign a judgment which it rendered but refused to sign."

A conclusion following, and at variance with, a finding of fact does not control or affect the finding made, but will be treated as mere surplusage. In this case the conflict of the conclusion with the findings of fact is parallel to the case of *U. S. v. Harris, et al*, 77 Fed. 821, in which the Court set aside a judgment based upon a conclusion in conflict with the findings of fact. In that case the Circuit Court of Appeals for the Seventh Circuit said:

> "It is insisted, however, that the question of setoff is determined by the last sentence of the finding, wherein the Court said: 'Under the evidence adduced

> at the trial in relation thereto, I *find that no set-off or recoupment* in favor of the government and against this claim *exists*. That expression has no proper place in the finding. *It is the statement of a conclusion, and does not control or affect the fact explicitly and properly stated*, that Harris had received of postmasters, upon forged orders the sum of $600, which, in the absence of any *statement of fact to the contrary*, will be presumed to have belonged to the Government * * *." (Italics ours.)

Respondents seek, not a writ of mandamus directing the exercise of discretion, but a writ compelling the entry of an order by the Commission carrying into effect the result of the exercise of its discretion. Section 16 of the Interstate Commerce Act provides that the Commission "*shall make an order*" awarding reparation when, after hearing, it finds that a shipper has been damaged by a violation of the Act. The duty to enter such an order *after* finding the requisite violation and resulting damage, involves no discretion on the part of the Commission and it is purely ministerial in nature. Therefore, the failure of the Commission to obey the positive mandate of the statute will be corrected by a writ of mandamus.

The action of the Commission sought here is not judicial in character, and the situation is analogous to that in *Life & F. Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949, in which the Supreme Court said at page 954:

> "On a mandamus a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide. But, so far as it regards the case under consideration, the signature of the judge was not a matter of discretion.

It followed as a necessary consequence of the judgement, unless the judgment had been set aside by a new trial. The act of signing the judgment is a ministerial and not a judicial act."

The award of damages to an injured shipper is not a matter of grace at the option of the Commission. The duty to accord a hearing and decide in accordance with the evidence is positive and mandatory under the statute. In *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 91, this Court said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. * * *
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' * * * or if the facts found do not, as a matter of law, support the order made (U. S. v. Baltimore & O. S. W. R. Co., 226 U. S. 14, ante 104, 33 Sup. Ct. Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 20, 51 L. Ed. 942, 27 Sup Ct. Rep. 585; Wisconsin, M & P R. Co. v. Jacobson, 179 U. S. 301, 45 L. Ed. 201, 21 Sup. Ct. Rep. 115; Washington Ex. Rel. Oregon R. (92) & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Muser v. Magone, 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77.)"

As pointed out by the court below the order complained of is negative in character and hence is not reviewable under *Procter & Gamble v. U. S.*, 225 U. S. 282. The only remedy available to respondents for the correction of the Commission's error is the writ of mandamus.

Petitioner's argument that mandamus is not the proper remedy is based upon the premise "that mandamus, as granted by the lower court, would compel the Commission to award reparation contrary to its judgment and discretion". Based upon this erroneous premise the decision of this Court in *Interstate Commerce Commission v. Waste Merchants' Association*, 260 U. S. 32, is cited as authority for denial of the writ.

But in that case the "Petitioners sought in the proceeding to set aside the adverse decision of the Commission *on the merits* and to *compel* a decision in *their favor.*" (Italics ours).

In the exercise of its judgment and discretion the Commission had made its findings that the rates charged were neither unreasonable nor discriminatory. In that case a petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia. It prayed that the Commission be directed to take jurisdiction of the claims, *allow damages*, and fix the amount thereof.

Obviously the issuance of the writ of mandamus in that case would have compelled the exercise of discretion in a particular manner, and in a manner directly contrary to the action already taken by the Commission for, as stated at page 34:

> "It (the Commission) heard the case fully. It found that the rates charged were not unreasonable or discriminatory, in violation of the Commerce Act, nor unreasonable for the service actually performed, in violation of the Federal Control Act."

None of the decisions of this Court, nor of the Court of Appeals of the District of Columbia cited by the petitioner, are in conflict with the decision of the Court of Appeals in the case at bar, for the reason that all the cases cited attempt, either to set aside administrative standards prescribed by the Commission, or to compel the Commission to make particular findings of fact in its quasi-judicial capacity. Far from seeking to set aside administrative standards prescribed by the Commission, or the findings of the Commission made in its quasi-judicial capacity, the respondents right to recover is grounded upon the administrative standard *and* findings as made by the Commission.

Conclusion.

The facts established by the Commission's findings, set out in its report, are:

1. That the rates exacted of complainant and accorded to its competitors, were unduly prejudicial to complainant and unduly preferential of its competitors to the extent of $15 per car, and therefore unlawful as violative of Section 3 (1) of the Interstate Commerce Act.

2. That by reason of the unlawful rates complainant was compelled to quote its prices f. o. b. Allingdale and was required to pay, and did prepay, a charge of $15 per car for the transportation of its lumber from its mills to Allingdale.

3. That the lumber was sold in competition with other lumber produced in the same general territory and enjoying the unduly preferential interstate through rates $15 per car less than complainant's lumber, and

4. That complainant was forced to base its selling price on the group rates accorded its competitors and absorb the unlawful charges of $15 per car to the junction point, Allingdale, W. Va.

Upon the fact of these findings of damage and the amount of the pecuniary loss per car, the Commission had no choice in awarding reparation, but had the positive and mandatory duty imposed by the mandatory provision of Section 16 of the Interstate Commerce Act to enter an order awarding reparation. Its conclusion that "the record will not support an award of reparation" is clearly in conflict with its findings of fact, is arbitrary, and without legal effect.

The order denying reparation being a negative order, mandamus is the only remedy available to the injured shipper. Mandamus will lie to compel the Commission to do that which it was obliged to do upon its own findings of damage, namely: to enter an order of reparation in favor of respondents.

The judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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April 15, 1933.

APPENDIX.

Applicable Sections of the Interstate Commerce Act.

Section 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

U. S. C. A., Title 49.

Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

U. S. C. A., Title 49.

Section 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction;

but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *.

U. S. C. A., Title 49.

Section 13 (1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

U. S. C. A., Title 49.

Section 14 (1). Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

U. S. C. A., Title 49.

Section 16 (1). That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

U. S. C. A., Title 49.

SUPREME COURT OF THE UNITED STATES.

No. 748.—October Term, 1932.

Interstate Commerce Commission, Petitioner, *vs.* United State of America on the relation of J. C. Campbell and others, trading as the Birch Valley Lumber Company, Respondents.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[May 8, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

Upon a complaint filed by the Birch Valley Lumber Company against carriers by rail engaged in interstate commerce, the Interstate Commerce Commission determined that rates maintained by the carriers were unduly prejudicial to the complainant and unduly preferential to its competitors, but that the record would not support an award of damages. Thereupon the complainant sued in the Supreme Court of the District of Columbia for a writ of mandamus commanding the Commission to make an award of damages in accordance with a stated formula. The Court of Appeals, reversing the determination of the lower court, held that the writ should issue. The case is here on certiorari.

The complainant before the Commission, the respondent in this court, is a lumber company engaged in business at Tioga, West Virginia. Transportation service to and from Tioga is supplied by the Strouds Creek and Muddlety Railroad Company (the S. C. & M.), a short line railroad running from Delphi, West Virginia, to Allingdale in that state, a distance of nine and a half miles. The terminus of this road at Allingdale is a junction point with the Baltimore & Ohio Railroad (the B. & O.), and through it with connecting lines beyond. Lumber dealers on the route of the B. & O. have had the benefit of blanket or group rates established by that road and others jointly. The complainant has had to pay the group rate, and in addition a charge for carriage on the S. C. & M., the

short line connection. The result has been to put it at a disadvantage as compared with competitors in the same producing territory. "Complainant," it is found, "does not question the reasonableness *per se* of the blanket or group rates for Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high." The controversy hinges upon the effect of an unlawful preference.

For rate making purposes the producing territory tributary to the B. & O. in Pennsylvania, Maryland, and West Virginia is divided into several groups. One of these groups known as the Richwood group has its terminus at Allingdale. So also has another group known as number 9. Lumber dealers competing with the complainant do business within this territory, and pay the group or blanket rate, which takes no heed of distances within the group area. Cf. *United States* v. *Ill. Central R. R. Co.*, 263 U. S. 515, 522. In some instances the blanket rate has been extended to short line connections, but this has been exceptional, and has not included any points on the S. C. & M. The additional charge paid by the complainant for the short line connection between Allingdale and Tioga (7.1 miles) is $15 per car. Another lumber company, engaged in business at Delphi, intervened in the proceedings and joined in the complaint. Both the complainant and the intervening shipper were "forced to base their prices on the group rates and absorb the charges of the S. C. & M."

The Commission found that the failure of the carriers to establish joint or group rates over the short line connections had the effect of an undue preference to lumber companies doing business within the group territory, though apart from the preference the rates were not unreasonable. Accordingly it made an order directed to the B. & O. and other connecting railroads to "cease and desist" from the unlawful practice. There was no award of damages. "The record," the Commission held, "will not support an award of reparation based on the undue prejudice found to exist."

The Interstate Commerce Act makes it unlawful for a carrier to give any undue or unreasonable preference to a person or locality, or to subject any person or locality to an undue disadvantage (24 Stat. 380, § 3; 41 Stat. 479, § 405; 49 U. S. C., § 3),

and charges the offender with liability for the full amount of damages resulting from the unlawful act. Section 8. Upon the hearing of a complaint, the Commission is empowered to ascertain the damages and award them. Section 16 (1). The respondent by its complaint to the Commission invoked this dual jurisdiction, the administrative jurisdiction to prescribe a rule for the future (*Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; *Baltimore & Ohio R. R. Co.* v. *Brady*, — U. S. —, March 13, 1933), and the judicial or quasi-judicial jurisdiction to give reparation for the past. *Baltimore & Ohio R. R. Co.* v. *Brady, supra.* In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Alton R. R. Co.* v. *United States*, 287 U. S. 229; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *B. & O. R. R. Co.* v. *Brady, supra.* Damages for discrimination denied by the Commission are not recoverable somewhere else.

The respondent, conceding these restrictions upon the remedies available in the courts, professes to abide by them. The argument is that damages were found by the Commission, and after being found were arbitrarily withheld. Damages were found, it is said, because the evidentiary facts set forth in the findings lead to a conclusion of damage in a determinate amount, and lead to that conclusion as an inference of law. Damages, being found, were arbitrarily withheld, because discretion is excluded when the loss is ascertained. In that view, the denial of an award is the breach of a ministerial duty to be corrected by mandamus, as if a court after determining in favor of a suitor the amount of his recovery were to refuse him execution.

1. "The record will not support an award of reparation based on the undue prejudice found to exist." This is not a finding that damages in the sum of $15 per car or in any other sum have been suffered by the complainant, but will not be awarded. This is a finding that upon the evidence before the Commission, which is not before us, there is not a sufficient basis for a finding of any damage whatever. Nothing in the recital of evidentiary facts is inconsistent as a matter of law with this negation of loss. The Commission does not find, and the complainant does not assert,

that the rate was unreasonable in the sense that it would be subject to condemnation if a like rate had been charged to others similarly situated. What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else. When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. *Penn. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Mitchell Coal Co.* v. *Penn. R. R. Co.*, 230 U. S. 247, 258; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534; *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, 165. Cf. *Postal Tel. Cable Co.* v. *Associated Press*, 228 N. Y. 370, 379, 380. It is an evidentiary circumstance to be viewed along with others in the setting of the occasion. It is not the measure without more. *Penn. R. R. Co.* v. *International Coal Co., supra; Keogh* v. *C. & N. W. Ry. Co., supra.*

Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. "The carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." *Southern Pac. Co.* v. *Darnell-Taenzer Co., supra*, p. 534. But a different measure of recovery is applicable "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less." *So. Pac. Co.* v. *Darnell-Taenzer Co., supra.* Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less (*Penn. R. R. Co.* v. *International Coal Co., supra*, pp. 206, 207), but which, whether more or less, is something to be proved and not presumed. *Ibid*, p. 204. "Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted." *Keogh* v. *C. & N. W. Ry. Co., supra*, p. 165. The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

The answer to that question is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula. If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price (*Penn. R. R. Co.* v. *International Coal Co., supra*, p. 207; *Hoover* v. *Penn. R. R. Co.*, 156 Pa. St. 220, 244), damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more. This complainant was in competition with producers in the Allingdale group. It was in competition, however, with many other producers doing business in distant territory, for its dealings were far flung. It had markets in Canada, Kentucky, Illinois, Michigan, Ohio, Pennsylvania, New York, New Jersey, Maryland, and the New England states. The finding is that "the lumber is sold in competition with that produced throughout the country," though "especially with that produced in the same general territory." For all that appears the prices charged for lumber by producers within the group were the market prices current generally throughout the entire field of competition.[1] If that is so, the producers in the favored territory were not making use of the preference to mark the price down to an equivalent extent, and thus deprive the complainant, less favorably situated, of a reasonable return. They were letting the price stand as it would have been if the tariff had been equal, and taking advantage of the preference to increase the profit for themselves. That was gain to them but it was not loss to the complainant.

The truth of this is seen more clearly when we keep in mind the varying methods available to remove discrimination and restore equality. The respondent argues as if there were one method, and one only, and this by cutting down the Tioga and Delphi rates and

[1]Cf. Donner Steel Co. *v.* Delaware, Lackawanna & Western R. R. Co., 92 I. C. C. 595, 599; Hylton Flour Mills, Inc. *v.* Los Angeles & Salt Lake R. R. Co., 152 I. C. C. 81; Coal Switching Reparation Cases at Chicago, 36 I. C. C. 226; also the following cases in which the prices had been fixed by the government: Home Packing & Ice Co. *v.* Director-General, 57 I. C. C. 691; Wharton Steel Co. *v.* Director General, 59 I. C. C. 11.

thus reducing them to the level of the rates within the group. But that is to ignore the other methods of adjustment open to the carriers. The discrimination might be removed either by cutting one set of charges down, or by lifting the other up, or by establishing a new rate intermediate between them. *United States* v. *Illinois Central R. R. Co., supra*, at p. 521; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The situation comes out into clear relief if we assume recourse to be had to the second of these methods. Rates within the favored territory might be raised to the same level as those outside of it, and yet after the change the complainant would be no better off, if the discrimination had not tended to hold market prices down. The profit of the favored shippers would in that event be less, just as it would be if they had been receiving a rebate from the published tariff (*Penn. R. R. Co.* v. *International Coal Co., supra*); but because their profit would be less, the conclusion would not be inevitable that the complainant's would be greater. The two would not fluctuate in any constant ratio. There would be no necessary correspondence between preference and damage. In varied situations the Interstate Commerce Commission has thus interpreted the doctrine of the International Coal case, and so given or withheld relief. The rulings of the Commission are consistent to the effect that the absorption by a complainant of a discriminatory charge does not avail to establish damage, or to measure its extent, in the absence of a showing that prices were affected by the differential rate.[2] There must be full disclosure of the conditions of the business, or of those affecting competition, including, in particular, the capacity of the preferred producers to fix the prices for the market. Only then will the ultimate fact of damage emerge from the evi-

[2]Memphis Freight Bureau *v.* Chicago & Eastern Illinois Ry. Co., 101 I. C. C. 26; Hylton Flour Mills, Inc. *v.* Los Angeles & Salt Lake R. R. Co., 152 I. C. C. 81; Coal Switching Reparation Cases at Chicago, 36 I. C. C. 226; Wharton Steel Co. *v.* Director General, 59 I. C. C. 11; Home Packing & Ice Co. *v.* Director-General, 57 I. C. C. 691; Donner Steel Co. *v.* D. L. & W. R. R. Co., 57 I. C. C. 745; Badger Lumber & Coal Co. *v.* A. T. & S. F. Ry. Co., 136 I. C. C. 350; Iten Biscuit Co. *v.* Chicago, B. & Q. R. R. Co., 53 I. C. C. 729; Stauffer Chemical *v.* Houston & Bragus Valley Ry. Co., 142 I. C. C. 327. Cf. Gallagher *v.* Pa. R. R. Co., 160 I. C. C. 563; Brooks Coal Co. *v.* Wabash R. R. Co., 39 I. C. C. 426; Chicago Bridge & Iron Works *v.* Director General, 85 I. C. C. 99.

dentiary facts as an appropriate conclusion. One cannot say from this record that there was that disclosure here.

2. The result, however, would be the same if we were to assume, *arguendo*, that there was error of law in the refusal to find the ultimate fact of damage as an inference from the evidentiary facts set out in the decision. The respondent even then is faced with the difficulty that the Commission did not think the inference permissible, and so declined to make it. One has only to read the opinions in *Pennsylvania Railroad Co.* v. *International Coal Co.*, *supra*, and the cases that have followed it, to see how much the rule of damages is beset by delicate distinctions, how preëminently in applying it there is a call upon the judge to think and act judicially, to use judgment and discretion. Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action. *Interstate Commerce Commission* v. *Waste Merchants Ass'n*, 260 U. S. 32, 34; *Wilbur* v. *United States*, 281 U. S. 206, 218; *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. R. Co.*, 287 U. S. 178, 204.

The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. *Standard Oil Co.* v. *United States*, *supra*; *Alton R. R. Co.* v. *United States*, *supra*; *Procter & Gamble Co.* v. *United States*, *supra*; *B. & O. R. R. Co.* v. *Brady*, *supra*. A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct reveiw. *I. C. C.* v. *Waste Merchants Ass'n*, *supra*, p. 35. There have been like attempts before in other

branches of the law of remedies. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Missouri Pacific R. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 581. They have met with no success.

The judgment of the Court of Appeals should be reversed and the petition for the writ denied.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.